Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

JORGE FILADELFO ROBLETO-PASTORA,

Petitioner,

v.

ERIC HOLDER, United States Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May an alien granted both asylum and lawful permanent resident status be lawfully deported to the country of persecution if asylum status has not been terminated?

2. May an alien granted both asylum and lawful permanent resident status, who subsequently commits a deportable offense, apply for adjustment of status and a humanitarian waiver in order to retain or reacquire lawful permanent resident status?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here, before the United States Court of Appeals for the Ninth Circuit and the Executive Office for Immigration Review (Board of Immigration Appeals and Immigration Court).

Petitioner here and before the Ninth Circuit Court of Appeals is Jorge Robleto-Pastora, a citizen of Nicaragua.

Respondent here and below is Eric H. Holder, Jr., United States Attorney General.

The prosecuting agency in Immigration Court and Appellee before the Board of Immigration Appeals was United States Immigration and Customs Enforcement.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY AND REGULATORY PROVISIONS 2
STATEMENT OF THE CASE 7
REASONS FOR GRANTING THE WRIT . . . 11

1. The Court of Appeals Amended Opinion is in direct conflict with the asylum statute, 8 U.S.C. § 1158(c), which prohibits the removal of an alien granted asylum unless asylum status is terminated. 11
2. The Court of Appeals Amended Opinion is in direct conflict with the asylum regulation, 8 C.F.R. § 1208.22, which prohibits the removal of an alien granted asylum unless asylum status is terminated.....14
3. The Court of Appeals holding, in the first instance and without prior resolution by the agency,

that an alien granted asylum who has acquired lawful permanent resident status cannot apply for adjustment of status and a waiver pursuant to 8 U.S.C. §§ 1159(b) and (c) is inconsistent with Articles 32 and 33 of the Refugee Convention and is in direct conflict with the *Ventura* ordinary remand rule.....16

CONCLUSION 24

APPENDIX 26

TABLE OF AUTHORITIES

Cases **Page**

Gonzales v. Thomas,
547 U.S. 183 (2006) 19, 26
Gutnik v. Gonzales,
469 F.3d 683 (7th Cir. 2006) 25
INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 20
INS v. Stevic,
467 U.S. 407 (1984) 20
INS v. Ventura,
537 U.S. 12 (2002) 25
Matter of Gabryelsky,
20 I. & N. Dec. 750 (BIA 1993) 27
Matter of Hernandez-Puente,
20 I. & N. Dec. 335 (BIA 1991) 19
Matter of K-A-,
23 I. & N. Dec. 661 (BIA 2004) 16, 24
Matter of Mendez,
21 I. & N. Dec. 296 (BIA 1996) 27
Matter of Smriko,
23 I. & N. Dec. 836 (BIA 2005) 13
Negusie v. Holder,
129 S. Ct. 1159 (2009) 20, 26

Nken v. Holder,
129 S. Ct. 1749 (2009) 25
Robleto-Pastora v. Holder,
567 F.3d 437 (9th Cir. 2009) ..... passim
Robleto-Pastora v. Holder,
591 F.3d 1051 (9th Cir. 2010) ..... passim
Saintha v. Mukasey,
516 F.3d 243 (4th Cir. 2008) 25
Smriko v. Ashcroft,
387 F.3d 279 (3rd Cir. 2004) 27
United States v. Mead,
533 U.S. 218 (2001) 19

STATUTES

8 U.S.C. § 1101(a)(43)(R) 12
8 U.S.C. § 1158(c) 8, 15, 24
8 U.S.C. § 1158(c)(1)(A) 6, 15, 22
8 U.S.C. § 1158(c)(1)(A)'s 13
8 U.S.C. § 1158(c)(2) 16
8 U.S.C. § 1158(c)(2)(A) 15, 16
8 U.S.C. § 1158(c)(2)(E) 15
8 U.S.C. § 1158(c)(3) 16
8 U.S.C. § 1159 ..... 17, 22
8 U.S.C. § 1159(a) 22
8 U.S.C. § 1159(a)(1)(C) 24, 25
8 U.S.C. §§ 1159(a) and (b) 22
8 U.S.C. § 1159(b) ..... passim

8 U.S.C. §§ 1159(b) and (c) ..... passim
8 U.S.C. § 1159(c) 12, 13, 23, 24, 26
8 U.S.C. § 1227(a)(2)(A)(iii) 12
28 U.S.C. § 1254(1) 6
8 USCS § 1182 10
8 USCS §§ 1182(a) 8, 10
8 USCS §§ 1229a, 1231 8
Oregon Revised Statutes § 165.013 12
Refugee Act of 1980 ..... 20, 21
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104 208, 110 Stat. 3009 (Sept. 30, 1996) 3
USCS § 1101(a)(42)(A) 9

REGULATIONS

8 C.F.R. § 1003.1(d)(1) 18
8 C.F.R. § 1208.17(d) 8
8 C.F.R. § 1208.22 ..... 6, 8, 9, 18
8 C.F.R. § 1208.24 ..... 8, 18
8 C.F.R. § 1208.24(f) 18

OTHER AUTHORITIES

United Nations Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. 16
United Nations Convention Related to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6223 19

PETITION FOR WRIT OF CERTIORARI

Petitioner Jorge Robleto-Pastora respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the proceedings below.

OPINIONS BELOW

The Amended Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 591 F.3d 1051 and is reprinted in the Appendix. The initial opinion of the Court of Appeals is reported at 567 F.3d 437 and is reprinted in the Appendix. The decisions of the Board of Immigration Appeals and the Immigration Judge are not reported, but the decisions are included in the Appendix.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its initial opinion on May 27, 2009. The Court of Appeals filed the Amended Opinion on January 11, 2010. Petitioner sought rehearing and rehearing en banc. The Court of Appeals' Order denying rehearing and rehearing en banc was filed on March 24, 2010. Pursuant to Rule 13.3, this petition is timely filed as it is within 90

days of March 24, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

This case involves the statutory prohibition against removal of an alien granted asylum found at 8 U.S.C. § 1158(c)(1)(A). The asylum regulation that expressly prohibits the deportation of an alien granted asylum unless asylum status is terminated is found at 8 C.F.R. § 1208.22. The relevant text of these provisions is as follows:

(c) Asylum status. –

(1) **In general.** – In the case of an alien granted asylum under subsection (b), the Attorney General –

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) **Termination of asylum**. – Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that –

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to the permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) **Removal when asylum is terminated.** An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section [sections] 212(a) and 237(a) [8 USCS §§ 1182(a), 1227(a)], and the alien's removal or return shall be directed by the Attorney General in accordance with sections 240 and 241 [8 USCS §§ 1229a, 1231].

8 U.S.C. § 1158(c).

§ 1208.22 Effect on exclusion, deportation and removal proceedings.

An alien who has been granted asylum may not be deported or removed unless his or her asylum status is terminated pursuant to § 1208.24. An alien in exclusion, deportation, or removal proceedings who is granted withholding of removal or deportation, or deferral of removal, may not be deported or removed to the country to which his or her deportation or removal is ordered withheld or deferred unless the withholding order is terminated pursuant to § 1208.24 or deferral is terminated pursuant to § 1208.17(d) or (e).

8 C.F.R. § 1208.22.

In addition, this case involves interpretation of the provisions related to the process by which an alien granted asylum may apply for lawful permanent resident status and a humanitarian or public interest waiver found at 8 U.S.C. §§ 1159(b) and (c). The text of these statutory provisions is as follows:

(b) Maximum number of adjustments; recordkeeping. - The Secretary of Homeland Security or the Attorney General, in the Secretary's or the Attorney General's discretion and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who –

(1) applies for such adjustment,

(2) has been physically present in the United States for at least one year after being granted asylum,

(3) continues to be a refugee within the meaning of section 101(a)(42)(A) [8 USCS § 1101(a)(42)(A)] or a spouse or child of such a refugee,

(4) is not firmly resettled in any foreign country, and

(5) is admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of examination for adjustment of such alien.

Upon approval of an application under this subsection, the Secretary of Homeland Security or the Attorney General shall establish a record of the alien's admission for lawful permanent residence as of the date one year before the date of the approval of the application.

(c) Coordination with 8 USCS § 1182. The provisions of paragraphs (4), (5), and (7)(A) of section 212(a) [8 USCS § 1182(a)] shall not be applicable to any alien seeking adjustment of status under this section, and the Secretary of Homeland Security or the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (F) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

8 U.S.C. §§ 1159(b) and (c).

This case also involves consideration of Articles 32 and 33 of the United Nations Convention Related to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6223, at 6259. These Articles state:

The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

Article 32.

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 33.

STATEMENT OF THE CASE

Petitioner, Mr. Jorge Robleto-Pastora, is a fifty year old citizen of Nicaragua who was granted asylum on December 5, 1986. Appendix ("App") 52a. Based on the grant of asylum, Mr. Robleto-Pastora became a lawful permanent resident of the United States on October 2, 1988. App. 24a.

While working as a janitor at a driving school, Mr. Robleto-Pastora was arrested, along with the owners of the business, and accused of providing false information on Oregon driver's license applications. App. 25a. Although the owners went to trial and were acquitted of all charges, Mr. Robleto-Pastora, pleaded no contest to six counts of violating Oregon Revised Statutes § 165.013 (forgery in the first degree) and he was sentenced to 13 months imprisonment. App. 25a. After serving 11 months of his sentence, Mr. Robleto-Pastora was taken into immigration custody and charged with removability under 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(R) (forgery offense with a 1 year sentence). App. 25a.

In Immigration Court, the removability charge was sustained and Mr. Robleto-Pastora sought to apply for adjustment of status and a waiver of inadmissibility under 8 U.S.C. §§ 1159(b) and (c) based on his asylum status, which had not been terminated. App.58a. On August 23, 2006, the Immigration Judge ruled that Mr. Robleto-Pastora was not eligible to apply for a waiver under 8 U.S.C. § 1159(c) because, as a lawful permanent resident, he was no longer an asylee. App. 78a.

On appeal to the Board of Immigration Appeals (BIA), Mr. Robleto-Pastora argued that his asylum status had not been terminated and, as a result, he was 1) not subject to removal, and 2) he

remained eligible to apply for adjustment of status under 8 U.S.C. § 1159(b), with a § 1159(c) waiver for a ground of inadmissibility. App. 55a. The BIA concluded that Mr. Robleto-Pastora was not eligible for adjustment of status because he retained lawful permanent resident status and not asylum status. App. 59a-61a. The BIA did not provide any analysis, other than to cite generally to Matter of Smriko, 23 I. & N. Dec. 836 (BIA 2005), which had held that a refugee who had acquired lawful permanent resident status was subject to removal proceedings without first having his refugee status terminated. The BIA acknowledged that Mr. Robleto-Pastora's asylum status had not otherwise been terminated. App. 59a. Mr. Robleto-Pastora sought review by way of a consolidated petition for review to the United States Court of Appeals for the Ninth Circuit.

In a published opinion filed on May 27, 2009, the United States Court of Appeals for the Ninth Circuit denied Mr. Robleto-Pastora's petition for review. Robleto-Pastora v. Holder, 567 F.3d 437 (9th Cir. 2009). The Court of Appeals determined that 8 U.S.C. § 1158(c)(1)(A)'s prohibition against returning an alien granted asylum to the person's country of nationality does not apply to an alien granted asylum after the alien acquires lawful permanent resident status. Robleto-Pastora, 567 F.3d at 444-445. Having determined that Mr. Robleto-Pastora lost his asylum status upon the acquisition of lawful permanent resident status, the Court of Appeals held that Mr. Robleto-Pastora was

no longer eligible to apply for adjustment of status or a humanitarian waiver because he had already previously acquired lawful permanent resident status. Robleto-Pastora, 567 F.3d at 447.

Mr. Robleto-Pastora sought rehearing of the Court of Appeals' May 27, 2009 Opinion. App. 1a. On January 11, 2010, the Court of Appeals filed an Amended Opinion that deleted the Court's holding that asylum status is terminated upon the acquisition of lawful permanent resident status. Robleto-Pastora v. Holder, 591 F.3d 1051, 1059 (9th Cir. 2010). The Court of Appeals stated that it was not deciding whether asylum status and lawful permanent resident status could be held simultaneously and indicated that whether or not Mr. Robleto retained asylum status he was ineligible to apply for adjustment of status and the statutory waiver designated for refugees or asylees who are subject to a ground of inadmissibility. Robleto-Pastora, 591 F.3d at 1059. In so ruling, the Court of Appeals has tacitly authorized the removal of an alien granted asylum status without regard to whether asylum status has been terminated and has issued a sweeping new interpretation of the asylum statute that forecloses the opportunity for an asylee who has acquired lawful permanent resident status to apply for adjustment of status and a humanitarian waiver under 8 U.S.C. §§ 1159(b) and (c) if placed in removal proceedings. Robleto-Pastora, 591 F.3d at 1159-1160.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Amended Opinion is in direct conflict with the asylum statute, 8 U.S.C. § 1158(c), which prohibits the removal of an alien granted asylum unless asylum status is terminated.

The asylum statute, 8 U.S.C. § 1158(c), prohibits the removal of an alien granted asylum unless asylum status is terminated. 8 U.S.C. § 1158(c)(1)(A). Specifically, in subpart (1), the statute provides: "In the case of an alien granted asylum under subsection (b), the Attorney General shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence." 8 U.S.C. § 1158(c)(1)(A).

In subpart (2), the Attorney General is authorized to terminate asylum status if a determination is made that certain disqualifying criteria are met. 8 U.S.C. § 1158(c)(2)(A) through (E). One basis for asylum termination is the acquisition of a new nationality, for example, naturalization to become a United States citizen. 8 U.S.C. § 1158(c)(2)(E). Notably, the acquisition of lawful permanent resident status is not an enumerated basis for terminating asylum status. 8 U.S.C. § 1158(c)(2)(A) – (E).

Finally, under subpart (3), when asylum status is terminated the individual is subject to any

applicable ground of inadmissibility or deportability and may be removed in accordance with the designated removal process. 8 U.S.C. § 1158(c)(3).

Here, the only conceivable basis to conclude that Mr. Robleto-Pastora's asylum status has been terminated would be to conclude that his asylum status was *automatically* terminated when he acquired lawful permanent resident status. See Robleto-Pastora, 567 F.3d at 444-446 (Ninth Circuit's initial opinion in this case discussing asylum termination). However, the statute does not provide for automatic termination of asylum status and the Board of Immigration Appeals, in a precedent decision, has held that there is no *automatic* termination of asylum status. Matter of K-A-, 23 I. & N. Dec. 661, 665 (BIA 2004) (the statute, by its terms, authorizes but does not compel the Attorney General to terminate asylum status).

Prior to returning an alien granted asylum to the country of persecution, Congress requires that the Attorney General make a determination terminating asylum status. 8 U.S.C. § 1158(c)(2). In this manner, Congress can insure that an alien granted asylum will not be returned to a country where the asylee may face persecution prior to a determination that a valid ground for asylum termination exists. See 8 U.S.C. § 1158(c)(2)(A) – (E).

The Board of Immigration Appeals expressly acknowledged that Mr. Robleto-Pastora's asylum

status had NOT been terminated, but apparently concluded that lawful permanent resident status and asylum status are mutually exclusive. App. In the Amended Opinion, the Court of Appeals declined to directly address the question of whether Mr. Robleto-Pastora's asylum status was automatically terminated by his acquisition of lawful permanent resident status and, if not, whether he could be lawfully ordered deported. Robleto-Pastora, 591 F.3d at 1059 ("Without deciding and regardless of whether Robleto simultaneously holds asylee and LPR status, we conclude that he is ineligible for relief from removal under section 209 of the INA, 8 U.S.C. § 1159, and that his petition must therefore be denied.").

By failing to consider the fundamental question of whether Mr. Robleto-Pastora retained asylum status after being granted lawful permanent resident status, the Court of Appeals has tacitly authorized the deportation of an alien granted asylum, to the country of persecution, in direct violation of the asylum statute.

This decision, which authorizes the removal of an alien granted asylum without a prior determination by the Attorney General to terminate asylum status, is in direct conflict with the asylum statute and potentially places the United States in violation of its international obligations to which it acceded when it ratified the 1967 United Nations Protocol Relating to the Status of Refugees. See United Nations Protocol Relating to the Status of

Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

2. The Court of Appeals Amended Opinionis in direct conflict with the asylum regulation, 8 C.F.R. § 1208.22, which prohibits the removal of an alien granted asylum unless asylum status is terminated.

The Attorney General's published regulation – to which the Board of Immigration Appeals is bound to follow and the Court of Appeals owes *Chevron* deference – states:

> An alien who has been granted asylum may not be deported or removed unless his or her asylum status is terminated pursuant to § 1208.24.

8 C.F.R. § 1208.22. Section 1208.24 sets forth the procedural framework for asylum termination, including the requirement of notice of intent to terminate that must be given to the asylee. 8 C.F.R. § 1208.24(f). In Mr. Robleto-Pastora's case, no notice was given, the regulation was not followed and his asylum status has not been terminated. App. 78a-79a.

It is well settled that the Board of Immigration Appeals is bound to follow and apply applicable statutory provisions and governing federal regulations. 8 C.F.R. § 1003.1(d)(1) (Board

shall resolve questions before it in a manner that is timely, impartial, and consistent with the Act and regulations); Matter of Hernandez-Puente, 20 I. & N. Dec. 335, 339 (BIA 1991). Similarly, the Court of Appeals owes *Chevron* deference to a published regulation promulgated by the Attorney General. United States v. Mead, 533 U.S. 218, 227 (2001).

The Court of Appeals Amended Opinion does not address or acknowledge the regulation that prohibits the deportation of an alien granted asylum unless asylum status is terminated. Robleto-Pastora, 591 F.3d at 1059, n. 5. Similarly, the Board of Immigration Appeals decision makes no mention of the asylum termination regulation. App. 76a.

The required asylum termination determination by the Attorney General is not a mere procedural formality; rather, it is an important safeguard created by Congress to insure careful consideration of whether circumstances are such that the humanitarian grant of asylum should be rescinded and the alien removed from the United States to a country where it has been previously demonstrated that he has a well founded fear of persecution. Because the Court of Appeals Amended Opinion authorizes the deportation of an alien granted asylum without a determination to terminate asylum, in contravention of the directly controlling regulation, the Court of Appeals decision should be reversed. See Gonzales v. Thomas, 547 U.S. 183, 186 (2006).

3. The Court of Appeals holding, in the first instance and without prior resolution by the agency, that an alien granted asylum who has acquired lawful permanent resident status cannot apply for adjustment of status and a waiver pursuant to 8 U.S.C. §§ 1159(b) and (c) is inconsistent with Articles 32 and 33 of the Refugee Convention and is in direct conflict with the *Ventura* ordinary remand rule.

The Supreme Court has consistently recognized that one of Congress' primary purposes in enacting the Refugee Act of 1980 was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees. INS v. Cardoza-Fonseca, 480 U.S. 421, 436-437 (1987); INS v. Stevic, 467 U.S. 407, 416-417 (1984) (the 1967 Protocol binds parties to comply with Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, adopted July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) ("Refugee Convention")); Negusie v. Holder, 129 S. Ct. 1159, 1166 (2009).

Articles 32 and 33 of the Refugee Convention place limitations on Contracting States' decisions to deport or remove refugees, or to return them to the country of persecution. Articles 32 and 33 of the Refugee Convention state:

Article 32:

> The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

Article 33:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

United Nations Convention Related to the Status of Refugees, Articles 32 and 33, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6223, at 6259.

In passing the Refugee Act of 1980, Congress created two specific provisions related to asylum that address when and under what circumstances an alien granted asylum may be deported or removed from the country. First, with 8 U.S.C. § 1158(c)(1)(A), Congress prohibited the removal of an alien granted asylum unless asylum status is terminated. 8 U.S.C. § 1158(c)(1)(A), amended by section 604 of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (IIRIRA).

Second, in 8 U.S.C. § 1159, Congress provided separate provisions for refugees and for aliens granted asylum to apply for lawful permanent resident status and thus begin the process to become fully integrated into the country. Compare 8 U.S.C. § 1159(a) with 8 U.S.C. § 1159(b). Among the differences between the two sections, a refugee is required to apply for permanent resident status after one year, so long as the refugee has not already acquired permanent resident status, whereas an alien granted asylum may, but is not required to apply for permanent resident status after one year. 8 U.S.C. §§ 1159(a) and (b). The requirement that a refugee has not previously acquired permanent resident status in order to apply for adjustment of status is not included in the adjustment of status provisions for aliens granted asylum. 8 U.S.C. §§ 1159(a) and (b). Therefore, the statute does not preclude an alien granted asylum who has previously acquired lawful permanent

resident status from applying for adjustment of status under this section.

In either case, Congress designated that specified grounds of inadmissibility would not apply to applications for permanent resident status under this section. 8 U.S.C. § 1159(c). In addition, Congress authorized a broad waiver provision that allows for a waiver of all other grounds of inadmissibility, except for drug trafficking, terrorism or national security, either for humanitarian purposes, to assure family unity or when it is in the public interest. 8 U.S.C. § 1159(c) ("[T]he Secretary of Homeland Security or the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."). The humanitarian waiver provision contained in 8 U.S.C. § 1159(c) helps to insure United States compliance with its obligations under the 1967 Protocol and Articles 32 and 33 of the Refugee Convention. See UNHCR Advisory Opinion on Refugee/Asylee Protection, Robleto-Pastora v. Holder, 24 February 2010. App. 79a-86a.

Notably, Congress did not place any limitations or restrictions on the opportunity for an alien granted asylum to apply for adjustment of status and a waiver under this provision, other than

the listed drug trafficking, terrorism or national security exceptions.

When read together, sections 1158(c) and 1159(c) present a unified scheme in which Congress has directed that, prior to the deportation or removal of an alien granted asylum, an opportunity to apply for the statutory waiver must be given and the Attorney General must make a determination that a ground for terminating asylum exists and that, under the specific circumstances of the case, asylum should be terminated and the waiver denied. See Matter of K-A-, 23 I. & N. Dec. 661, 665 (BIA 2004) (the statute, by its terms, authorizes but does not compel the Attorney General to terminate asylum status).

Here, in holding that an alien who has been granted both asylum and lawful permanent resident status is not eligible to apply under §§ 1159(b) and (c) for adjustment of status, the Court of Appeals relied heavily on case law that addresses whether a *refugee* who has acquired lawful permanent resident status may apply to readjust status under 8 U.S.C. § 1159(b). Robleto-Pastora, 1059-1062. In doing so, the Court of Appeals improperly read into the asylee adjustment provision the refugee requirement of not having previously acquired lawful permanent resident status. See 8 U.S.C. § 1159(a)(1)(C).

A careful reading of the refugee cases relied on by the Court of Appeals reveals a strict fidelity to the statutory language used by Congress. Those

decisions discretely considered the adjustment of status section related to refugees without addressing the sections related to aliens granted asylum. See Gutnik v. Gonzales, 469 F.3d 683, 692 (7th Cir. 2006) (refugee statute expressly permits adjustment of status only if refugee has not previously acquired lawful permanent resident status); Saintha v. Mukasey, 516 F.3d 243, 252-53 (4th Cir. 2008) (refugee statute's express terms preclude adjustment of status if refugee has already acquired lawful permanent resident status).

Both the Seventh Circuit in Gutnik and the Fourth Circuit in Saintha relied on the express statutory provision in the refugee statute that precludes adjustment of status to a refugee who has already acquired lawful permanent resident status. See 8 U.S.C. § 1159(a)(1)(C). There is not a similar preclusion for an alien granted asylum. See 8 U.S.C. § 1159(b). Had Congress wanted to apply a similar preclusion to an alien granted asylum who has acquired lawful permanent resident status it could have easily done so by including the same statutory language. However, Congress chose not to do so. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Nken v. Holder, 129 S. Ct. 1749, 1759 (2009).

"Generally speaking, a court of appeals should remand a case to an agency for decision of a matter

that statutes place primarily in agency hands." INS v. Ventura, 537 U.S. 12, 16 (2002). Under what is now commonly referred to as the *Ventura* remand rule, the Supreme Court has emphasized that ambiguities in statutes within an agency's jurisdiction to administer are congressional delegations of authority to the agency to fill the statutory gap in a reasonable fashion and that this process "involves difficult policy choices that agencies are better equipped to make than courts." Negusie, 129 S. Ct. at 1167; Gonzales v. Thomas, 547 U.S. 183, 186-187 (2006).

In Negusie, the question centered on whether the asylum statute's persecutor bar allows for an exception for an asylum seeker who may have been compelled to participate in persecution under duress. Negusie, 129 S. Ct. at 1162. The Court explained that principles of *Chevron* deference apply to the BIA's interpretation of the asylum statute and that judicial deference in the immigration context is especially important because executive officials "exercise especially sensitive political functions that implicate questions of foreign relations." Negusie, 129 S. Ct. at 1164, citing INS v. Abudu, 485 U.S. 94, 100 (1988). The Court held that the proper course, absent rare circumstances, is to remand to the agency to address the statutory question in the first instance. Negusie, 129 S. Ct. at 1167.

Here, the Court of Appeals readily acknowledged that there was no precedent

concerning the availability of a § 1159(b) adjustment of status application with a § 1159(c) waiver for an alien granted both asylum and lawful permanent resident status. The Court of Appeals distinguished BIA case law that authorizes lawful permanent residents to apply for adjustment of status – or "readjustment" – in removal proceedings and which supports Mr. Robleto-Pastora's position that he is not precluded from applying for adjustment of status by virtue of having previously acquired lawful permanent resident status. Robleto-Pastora, 591 F.3d at 1060, n. 6; See Matter of Gabryelsky, 20 I. & N. Dec. 750, 752 (BIA 1993) ("The fact that the respondent has been a lawful permanent resident does not preclude him from applying for adjustment of status"); Matter of Mendez, 21 I. & N. Dec. 296, 298 (BIA 1996) ("The fact that he is a lawful permanent resident does not preclude him from applying for adjustment of status under section 245.").

Rather than decide this highly complex and politically sensitive statutory question in the first instance, the Court of Appeals should have employed the approach taken by the Third Circuit Court of Appeals in Smriko v. Ashcroft, 387 F.3d 279, 281 (3rd Cir. 2004). There, the Third Circuit was faced with the question whether refugee status is lost upon the acquisition of lawful permanent resident status and whether termination of refugee status is necessary prior to entry of an order of removal. Smriko v. Ashcroft, 387 F.3d at 283-286. The Third Circuit remanded the question to the BIA

so that it could answer the question in a manner that would satisfy the principles of *Chevron*. Id. at 297 ("Rather than usurping the role of the BIA and establishing a precedent that the Board's expertise might counsel against, we now grant the petition for review.").

Because the Court of Appeals chose to interpret the asylum statute in the first instance, in a way that conflicts with international obligations and places aliens granted asylum at risk of deportation to the country of persecution without even an opportunity to apply for a humanitarian waiver, the Court should grant the writ and reverse the Court of Appeals with instructions to remand Mr. Robleto-Pastora's case to the Board of Immigration Appeals.

CONCLUSION

For the aforesaid reasons, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

June 22, 2010

Respectfully submitted,

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APPENDIX

Robleto-Pastora v. Holder, 591 F.3d 1051 (9th Cir. 2010) (amended petition). . . . . .p. 1a

Robleto-Pastora v. Holder, 567 F.3d 437 (9th Cir. 2009) p.23a

Board of Immigration Appeals' decision, dated May 3, 2007 . . . . . p.51a

Board of Immigration Appeals' decision, dated March 27, 2007 . . . . . p.54a

Immigration Judge's decision, dated December 5, 2006 . . . . . .p. 62a

Immigration Judge's decision, dated August. 23, 2006 . . . . . .p.75a

U.S. Court of Appeals for the Ninth Circuit Order denying Petition for Rehearing, dated January 11, 2010 . . . . . p. 77a

UNHCR Advisory Opinion. p.79a

8 USCS § 1101(a)(42). p.97a

8 U.S.C. § 1158(b). . . . . p. 98a

8 U.S.C. § 1158(c). . . . . .p. 102a

8 U.S.C. § 1159(a) . . . . . .p 104a

8 U.S.C. § 1159(b) p.105a

8 U.S.C. § 1159(c) . . . . . p. 106a

8 C.F.R. § 1208.22 . . . . . p 106a.

8 C.F.R. § 1208.24(f) p.107a

1951 Convention Relating to the Status of Refugees, 19 U.S.T 6259, 189 U.N.T.S. 150

ARTICLE 32 . . . . . p. 108a

ARTICLE 33 . . . . . p. 108a

JORGE FILADELFO ROBLETO-PASTORA, Petitioner, v. ERIC H. HOLDER JR., Attorney General, Respondent.

No. 07-71492,No. 07-72091

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

591 F.3d 1051; 2010 U.S. App. LEXIS 3250

December 10, 2008, Argued and Submitted, Seattle, Washington
January 11, 2010, Amended

PRIOR HISTORY: [**1]
On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A027-447-476.

Agency No. A027-447-476.
Robleto-Pastora v. Holder, 567 F.3d 437, 2009 U.S. App. LEXIS 11121 (9th Cir., 2009)

COUNSEL: For Petitioner: Philip James Smith, Nelson Smith, LLP, Portland, Oregon.

For Respondent: Gregory G. Katsas, Richard M. Evans, and Paul Fiorino, United States Department of Justice, Washington, D.C.

JUDGES: Before: Robert R. Beezer, Ronald M. Gould and Consuelo M. Callahan, Circuit Judges.

OPINION BY: Consuelo M. Callahan

OPINION

[*1054] AMENDED OPINION

CALLAHAN, Circuit Judge:

Jorge Filadelfo Robleto-Pastora ("Robleto" or "petitioner"), born June 5, 1960, is a native and citizen of Nicaragua who entered the United States in 1984, was granted asylum, then adjusted status to that of lawful permanent resident (sometimes referred to herein as "LPR") in 1988. Following his 2005 forgery conviction in Oregon state court, petitioner was ordered removed as an aggravated felon pursuant to sections 237(a)(2)(A)(iii) and 101(a)(43)(R) of the Immigration and Nationality Act ("INA"). 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1101(a)(43)(R). He petitions for review of the removal order, and the denial of his motion to reconsider that order. We deny both petitions.

I.

A. Factual Background

Robleto and several of his family members left [**2] Nicaragua in the mid-1980s when the Sandinistas rose to power. In 1986, he and other family members were granted asylum pursuant to section 208 of the INA. *See* 8 U.S.C. § 1158. On October 2, 1988, he adjusted his status to lawful permanent resident pursuant to section 209(b). 8 U.S.C. § 1159(b).

In October 2004, Robleto was arrested and charged in Oregon state court with forgery-related offenses involving the distribution of false identifications. On July 29, 2005, he pled no contest to six counts of first-degree forgery, and was sentenced to thirteen months in prison. He was released from prison after eleven months, and then charged with removability under section 237(a)(2)(A)(iii) of the INA. *See* 8 U.S.C. § 1227(a)(2)(A)(iii).

During the removal proceedings, Robleto sought relief from removal by (1) submitting a new application for asylum, (2) [*1055] applying for withholding of removal under section 241(b)(3) of the INA and the Convention Against Torture ("CAT"), and (3) seeking to adjust his status under section 209(b) of the INA in connection with a waiver of inadmissibility under section 209(c). 8 U.S.C. § 1159(b)-(c).

On August 23, 2006, an Immigration Judge ("IJ") ruled that Robleto was [**3] ineligible to

apply for adjustment of status under section 209(b) because that section was available only to asylees, and not lawful permanent residents such as Robleto.

Following several continuances, Robleto appeared before an IJ on December 5, 2006. He testified that his father and brother were employees in the Somoza government, and that he worked as a mechanic in the government's "General Customs" division. All three of them lost their jobs when the Sandinistas took control of the government. Robleto testified that he was unable to find gainful employment after he was fired, but admitted that he did not look for work in the private sector.

Other than losing his job, Robleto did not allege that he suffered actual persecution by the Sandinistas. Robleto's mother testified generally that the Sandinistas harassed the entire family due to their association with the Somoza government, but she failed to identify any specific persecution suffered by Robleto. Robleto's brother, Sergio, however, was detained by the Sandinistas for several hours in 1981 based on suspicions that he was involved with a school bombing. Another brother, Alvaro, was also detained by the Sandinistas in 1982, and [**4] was beaten and tortured. Robleto further testified that he is related to Eden Pastora, a famous anti-Sandinista leader.

Noting the 2006 reelection of Sandinista leader, Daniel Ortega, Robleto testified that he feared returning to Nicaragua. He alleged that the government would think he was an American spy, but cited no basis for this fear. He also failed to

produce evidence that the current democratically-elected administration was persecuting former Somoza-government employees or members of his family. In fact, he testified that several aunts and uncles from both sides of his family, and at least one grandparent, still live in Nicaragua, and his mother testified that she and her husband had gone back to visit since leaving in the 1980s.

Citing, among other things, Robleto's aggravated felony, the IJ denied Robleto's application for asylum. [1] The IJ also denied his application for withholding based on his failure to establish past persecution or a well-founded fear of persecution, and ordered him removed to Nicaragua.

B. BIA Decision

On March 27, 2007, the BIA dismissed Robleto's appeal from the IJ's decision finding him removable as charged and denying his applications for relief. The BIA held that the IJ properly pretermitted Robleto's new asylum application based on his aggravated felony conviction, and concluded that Robleto failed to establish that he was entitled to withholding of removal. The BIA

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[1] The IJ concluded that Robleto had obtained asylum derivatively through his father. While it is unclear from the record whether his grant of asylum was primary or derivative, [**5] it was nonetheless his burden to establish past persecution or a well-founded fear of future persecution. *See Umuakhaulu v. Gonzales*, 416 F.3d 931, 937-39 (9th Cir. 2005).

rejected Robleto's contentions that he retained the status of an asylee, and that such status entitled him to a presumption of a well-founded fear of persecution. Noting that his original asylum application contained no allegation of past persecution, the BIA held that a prior grant of asylum was insufficient to establish the presumption. The BIA noted that [*1056] Robleto presented no evidence that he would be of any interest to the current administration, or that he otherwise persecuted former Somoza-government employees or relatives of former government employees. Accordingly, the BIA concluded that Robleto failed to establish a likelihood [**6] of future persecution in Nicaragua.

The BIA also concluded that Robleto's status was that of a lawful permanent resident, not an asylee, and that he retained that status until a final order of removal. Thus, it concluded that Robleto's request to apply for adjustment of status under section 209(b) in connection with a waiver of inadmissibility under section 209(c) "made no sense." Finally, the BIA concluded that Robleto's due process rights were not violated when the IJ denied his request for a continuance to obtain his immigration records because he failed to establish prejudice resulting from the denial.

On April 20, 2007, Robleto filed a motion for reconsideration with respect to the BIA's determination that he was ineligible to apply for adjustment of status under section 209(b). On May 3, 2007, the BIA denied Robleto's motion to reconsider. Robleto filed timely petitions for review

of that order and the March 27, 2007, order dismissing his appeal.[2]

II.

A. Jurisdiction and Standards of Review

We [**7] have jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review final orders of removal involving "constitutional claims or questions of law," such as the ones presented in Robleto's petitions. *See Morales Alegria v. Gonzales*, 449 F.3d 1051, 1053 (9th Cir. 2006). Where the BIA conducts its own review of the evidence and law, "our review is limited to the BIA's decision, except to the extent the IJ's opinion is expressly adopted." *Hosseini v. Gonzales*, 471 F.3d 953, 957 (9th Cir. 2006) (citation and internal quotation marks omitted).

We review the BIA's determination of purely legal questions de novo. *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004). We may reverse the BIA's determination that an applicant is ineligible for asylum or withholding of removal "only if the evidence presented by [the applicant] is such that a reasonable fact-finder would be compelled to conclude that the requisite fear of persecution existed." *Khourassany v. INS*, 208 F.3d 1096, 1100

[2] Petitioner presents no independent grounds challenging the order denying his motion to reconsider. Accordingly, we deny his petition for review of that order for the reasons set forth herein.

(9th Cir. 2000); *see also INS v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S. Ct. 812, 117 L. Ed. 2d 38 n.1 (1992) (noting that "[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it") [**8] (emphasis in original).

B. Application for Asylum and Withholding of Removal

We begin with the most straightforward of petitioner's claims for relief: his applications for asylum and withholding of removal under the INA and the CAT. "An application for asylum under 8 U.S.C. § 1158 is generally considered an application for withholding of removal under 8 U.S.C. § 1231(b)(3)." *Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006) (citing 8 C.F.R. § 1208.3(b)). For asylum applications filed after April 1, 1997, an applicant is also considered for eligibility for withholding of removal under the CAT. *See* 8 C.F.R. § 208.13(c)(1).

"An alien is eligible for asylum relief if she can prove that she is a refugee, [*1057] which she can establish by proving either actual past persecution or a well-founded fear of future persecution" on account of race, religion, nationality, membership in a particular social group, or political opinion. *Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007); 8 U.S.C. § 1101(a)(42)(A). The agent(s) of persecution must be "the government or . . . persons or organizations which the government is unable or unwilling to control." *Reyes-Reyes v.*

Ashcroft, 384 F.3d 782, 788 (9th Cir. 2004) [**9] (internal quotation marks omitted). "Once an applicant demonstrates past persecution, there is a presumption of a well-founded fear of future persecution." *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000).

Robleto argues that he is eligible for asylum and withholding based on his previous grant of asylum, which he asserts entitles him to a presumption of a well-founded fear of future persecution. However, even assuming that Robleto's previous grant of asylum was based on actual past persecution, the BIA correctly determined that he is currently ineligible for asylum due to his aggravated felony conviction. [3] *Rendon v. Mukasey*, 520 F.3d 967, 973 (9th Cir. 2008) (recognizing that an alien convicted of an aggravated felony is ineligible for asylum) (citing U.S.C. §§ 1158(b)(2)(A)(ii), (b)(2)(B)(I)); *see also* 8 C.F.R. § 1208.13(c)(1) (providing that for applications filed after April 1, 1997, an applicant "*shall not qualify* for asylum" if he has been convicted of an aggravated felony) (emphasis added).

While Robleto's conviction precludes his current asylum application, it does not preclude his application for withholding [**10] of removal under section 241(b)(3) of the INA. 8 U.S.C. § 1231(b)(3). [4]

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[3] Robleto does not contest that his conviction is an aggravated felony.

[4] Robleto's aggravated felony does not bar him from applying for withholding of removal under 8 U.S.C. § 1231(b)(3). Subsection (b)(3)(B)(ii) provides that an alien

"To qualify for withholding of removal, an alien must demonstrate that it is more likely than not that he would be subject to persecution on one of the specified grounds.'" *Zehatye*, 453 F.3d at 1190 (quoting *Al-Harbi* v. *INS*, 242 F.3d 882, 888 (9th Cir. 2001)). The "standard for withholding of removal is more stringent than the well-founded fear standard governing asylum," and "requires objective evidence that it is more likely than not that the alien will be subject to persecution upon deportation." *Id.* (citations and quotation marks omitted). While a showing of past persecution entitles an alien to a presumption of eligibility for withholding of removal, it is the alien's burden to establish such persecution. *Fedunyak v. Gonzales*, 477 F.3d 1126, 1130 (9th Cir. 2007); *Unuakhaulu*, 416 F.3d at 938-39.

The BIA determined that Robleto's prior grant of asylum was insufficient to establish a presumption of a well-founded fear of future persecution based on past persecution. We agree.

Here, neither the record nor Robleto's own testimony establishes past persecution. While Robleto's original asylum application identifies

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convicted of a "particularly serious crime" is ineligible for withholding of removal. The statute authorizes the Attorney General to designate a crime "particularly [**11] serious" and provides that any aggravated felony resulting in a sentence of five years or more "shall be considered . . . a particularly serious crime." 8 U.S.C. § 1231(b)(3)(B). Here, Robleto's conviction did not result in a sentence of five or more years, and the Attorney General has not otherwise determined that his crime is "particularly serious."

incidents from the early 1980s involving his brothers, Sergio and Alvaro, it contains no allegation that Robleto himself was persecuted. *See Prasad* [*1058] *v. INS*, 47 F.3d 336, 340 (9th Cir. 1995) (concluding that "attacks on family members do not necessarily establish a well-founded fear of persecution absent a pattern of persecution tied to the petitioner[ ]"). Moreover, Robleto acknowledged during the immigration proceedings that, other than losing his job, he was not personally targeted by the Sandinistas. Even in his 2006 application [**12] for asylum and withholding of removal, Robleto identified no instances of persecution involving himself. Based on Robleto's failure to establish that his prior grant of asylum was based on past persecution, we conclude that the BIA correctly determined that he was not entitled to a presumption of a well-founded fear of persecution.

Furthermore, we find that the record supports the BIA's determination that Robleto failed to show a likelihood of future persecution in Nicaragua. Robleto presented no evidence indicating that the current administration persecutes former employees of the Somoza government or family members of those who opposed the Sandinistas more than twenty years ago. Moreover, Robleto failed to present a plausible basis for his alleged fear of returning to Nicaragua. Rather, he testified that he thought that the current Nicaraguan administration would think he was an American spy because he had unsuccessfully tried to enlist in the United States Army in the early 1990s. He did not

indicate how the administration would know this fact, or why it would lead the government to believe he was a spy, or even that the government actually persecutes American "spies." Finally, he [**13] offered no evidence that any family member or former government employee is persecuted by the current Nicaraguan administration, and indicated that several of his aunts and uncles from both sides of his family, and at least one grandparent, still live in Nicaragua.

Based on this record, we are not compelled to reach a conclusion contrary to the BIA's. *See Khourassany*, 208 F.3d at 1100. Neither can we conclude that petitioner is entitled to relief under the CAT, as there was no evidence regarding a likelihood that Robleto would be tortured upon his return. *See Hamoui v. Ashcroft*, 389 F.3d 821, 826-27 (9th Cir. 2004) (noting that to be eligible for withholding under the CAT, the applicant must establish that he is "more likely than not" to be tortured upon removal). Based on the foregoing, we conclude that the BIA's determination is supported by the record, and that Robleto is not entitled to withholding from removal under the INA or the CAT.

C. Relief under Section 209(b) and (c)

Robleto asserts that he can avoid removal by "readjusting" his status to that of a lawful permanent resident under section 209(b) in connection with a waiver of inadmissibility under 209(c). Section 209(b) allows [**14] an asylee to

adjust status to that of LPR, but requires that the asylee be otherwise admissible. 8 U.S.C. § 1159(b)(5). Petitioner concedes inadmissibility based on his aggravated felony conviction, and seeks to overcome this barrier to adjustment through a waiver of inadmissibility pursuant to section 209(c). Section 209(c) provides the Secretary of Homeland Security or the Attorney General with discretion to waive inadmissibility "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1159(c).

Despite having already obtained LPR status in 1988, petitioner contends that he is eligible for relief under section 209 because his asylee status was never terminated, and that he therefore holds asylee status and LPR status simultaneously. [5] [*1059] Without deciding and regardless of whether

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[5] Petitioner premises his argument for relief under § 209 on the fact that his asylum status was never formally terminated. He asserts that section 208(c)(3) of the INA [**15] and its attendant regulations require formal termination of asylum status prior to removal. Section 208(c)(3), however, simply provides that asylum may be terminated under specific circumstances and says nothing about formal termination proceedings. 8 U.S.C. § 1158(c)(3). Further, in the analogous context of refugees who have obtained LPR status, we have held that formal termination of refugee status is not a precondition to removal. *Kaganovich v. Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006) (noting that "regardless of whether a refugee loses refugee status upon adjusting status to lawful permanent resident . . . the refugee may be removed") (citing *In re Smriko*, 23 I. & N. Dec. 836, 842 (BIA 2005)); *see also Stolaj v. Holder*, 577 F.3d 651, 657 (6th Cir. 2009) (holding that formal termination of asylum status was not a precondition to removing a lawful permanent resident).

Robleto simultaneously holds asylee and LPR status, we conclude that he is ineligible for relief from removal under section 209 of the INA, 8 U.S.C. § 1159, and that his petition must therefore be denied.

Section 209(b) provides as follows:

> The Secretary of Homeland Security or the Attorney General . . . may *adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum* who--
>
> (1) applies for such adjustment,
>
> (2) has been physically present in the United States for at least [**16] one year after being granted asylum,
>
> (3) continues to be a refugee within the meaning of section 1101(a)(42)(A) of this title or a spouse or child of such a refugee,
>
> (4) is not firmly resettled in any foreign country, and
>
> (5) is admissible . . . .

8 U.S.C. § 1159(b) (emphasis added). By its own terms, section 209(b) applies to *asylees* seeking to adjust status to that of LPR, a process petitioner completed in 1988. It says nothing about a lawful permanent resident "re-adjusting" his status to that of lawful permanent resident. Nor does section 209 provide that such adjustment of status is a means to avoid removal. *Cf. Abebe v. Mukasey*, 554 F.3d 1203,

1205 (9th Cir. 2009) (en banc) (construing former section 212(c) of the INA in accordance with its plain language as only providing discretionary relief from madmissibility -- *not* deportation). Petitioner cites no authority, nor could we find any, providing that an asylee who acquires LPR status is eligible for relief from removal under section 209. [6] Morever, relevant authority indicates that aliens retain their LPR status until a final order of removal *See* 8 C.F.R. § 1001.1(p). [7] Thus, regardless of whether petitioner retained his asylee [**17] status simultaneously with his LPR [*1060] status,

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[6] Petitioner cites several BIA cases in which lawful permanent residents were permitted to seek relief from removal by "re-adjusting" status to that of LPR pursuant to section 245(a) of the INA in connection with section 212's various waiver provisions. Those cases are inapposite as they concern distinct statutes which apply to broad classes of aliens who have immigrant visas immediately available. *See In re Mendez-Moralez*, 21 I. & N. Dec. 296 (BIA 1996); *Matter of Gabryelsky*, 20 I. & N. Dec. 750 (BIA 1993). By contrast, section 209(b) is specific to asylees, and it has never been construed to apply to asylees who have already obtained [**18] LPR status and who merely seek to avoid removal. *See In re K A* , 23 I. & N. Dec. 661 (BIA 2004) (concluding that an asylee could apply for relief from removal under section 209(b) and (c) where she had not previously acquired LPR status).

[7] That section defines "[t]he term lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. *Such status terminates upon entry of a final administrative order of exclusion, deportation, removal, or rescission*" (emphasis added).

there is no dispute that he remained an LPR until a final order of removal. Accordingly, as an asylee who already acquired LPR status, section 209(b) does not apply to him, and by extension, the waiver of inadmissibility under section 209(c) is also foreclosed. We therefore affirm the BIA's decision and hold that an alien who has previously adjusted status to that of LPR retains that status until a final order of removal and cannot "re-adjust" status to that of an LPR under section 209(b) in order to avoid removal.

We find support for our perspective in cases from our sister circuits, which have held that *refugees* who adjust status to lawful permanent resident are ineligible for relief from removal under section 209(a) in connection with a waiver of inadmissibility under section 209(c). *Gutnik v. Gonzales*, 469 F.3d 683, 692 (7th Cir. 2006) (holding that an alien who adjusted status from refugee to LPR was no longer eligible to apply for a waiver of inadmissibility in connection with an adjustment of status under section 209); *Saintha v. Mukasey*, 516 F.3d 243, 252-53 (4th Cir. 2008) [**19] (applying *Chevron* deference to the BIA's determination that a refugee who had already acquired LPR status was precluded from subsequently re-adjusting to LPR status).

While these cases involve section 209(a), which concerns adjustment of status from *refugee* to LPR, they are nonetheless instructive. In *Gutnik*, the Seventh Circuit deferred to the BIA's determination that relief under section 209 was unavailable to a removable refugee who had

previously adjusted his status to that of LPR. *Gutnik*, 469 F.3d at 692. The BIA noted that allowing Gutnik to apply for a waiver under section 209(c) would place "him at an unfair advantage over other aliens and would improperly insulate him from his criminal misconduct which occurred many years after his arrival as a refugee." *Id.* at 689. This reasoning echoes the concern we voiced in *Kaganovich* in deciding that refugee status should not be used to insulate aliens from the otherwise applicable removal statute. 470 F.3d at 898 (finding persuasive the BIA's holding in *In re Smriko*, 23 I. & N. Dec. 836 (BIA 2005) that 8 U.S.C. § 1157(c)(4) should not be read to shield refugees from the INA's general removal provision).

Similarly, in *Saintha*, the Fourth [**20] Circuit deferred to the BIA's interpretation of section 209(a)(1) as precluding relief from removal for a refugee who had previously acquired LPR status. [8]*Saintha*, 516 F.3d at 247, 253. The BIA

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[8] Section 209(a)(1) provides [**21] in relevant part:

a) Criteria and procedures applicable for admission as immigrant; effect of adjustment.

(1) Any alien who has been admitted to the United States under section 1157 of this title

(A) whose admission has not been terminated by the Secretary of Homeland Security or the Attorney General pursuant to such regulations as the Secretary of Homeland Security or the Attorney General may prescribe,

(B) who has been physically present in the United States for at least one year, and

(C) *who has not acquired permanent resident status*, shall, at the end of such year period, return or be returned to the custody of the Department of Homeland Security for

rejected Saintha's application to adjust status a second time under section 209(a) in connection with a waiver of inadmissibility under section 209(c), concluding that the plain language of section 209(a)(1) precluded "a refugee who has already acquired LPR status . . . from subsequently re-adjusting to LPR status." *Id.* at 247. More specifically, the [*1061] BIA read section 209(a)(1) as providing three criteria for adjusting status, one of which requires the alien not to have already "acquired permanent resident status." *Id.* at 253. Because Saintha had already acquired LPR status, he could not satisfy this criterion, and therefore was ineligible to adjust status a second time. *Id.* The Fourth Circuit agreed with the BIA's interpretation, noting that it was "logical to conclude that an alien . . . who has previously acquired permanent resident status but was later rendered removable by the commission of multiple crimes, is ineligible to acquire LPR status again under § 1159." *Id.*

We find the Fourth and Seventh Circuits' interpretation of section 209(a) to be persuasive, and we see no reason why we should read 209(b) in a contrary manner with respect to asylees who have acquired lawful permanent resident status. Although section 209(a) explicitly provides that adjustment under that section is unavailable to refugees [**22] who have already "acquired permanent resident status," *see* 8 U.S.C. §

inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 1225, 1229a, and 1231 of this title.

8 U.S.C. § 1159(a)(1) (emphasis added).

1159(a)(1)(C), and section 209(b) contains no such provision, the language of section 209(b) is nonetheless plain. It provides the Secretary of Homeland Security or the Attorney General with discretion to "adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum . . . ." 8 U.S.C. § 1159(b). Simply put, it allows the government to adjust an alien's status from asylee to LPR; it does not permit "re-adjustment" of status for asylees who have already acquired LPR status and we decline to expand the statute's coverage to such individuals. To do so would provide unique relief to asylees who have acquired LPR status, while precluding such relief for similarly situated refugees, many of whom, unlike petitioner, will not have been convicted of an aggravated felony.

Significantly, the legislative history of the INA's asylum provisions supports our reluctance to treat refugees and asylees disparately, as it indicates that the two classes of aliens were to have essentially "equivalent status" under the law. The INA's asylum provisions were enacted into law pursuant to the [**23] Refugee Act of 1980. The Refugee Act, in addition to "regulariz[ing] the procedures governing the admission of refugees into the United States," *INS v. Stevic*, 467 U.S. 407, 425, 104 S. Ct. 2489, 81 L. Ed. 2d 321 (1984), required the Attorney General to establish procedures for "determining asylum claims filed by aliens who are physically present in the United States." Refugee Act of 1980, S. Rep. No. 96-256, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 149. The legislative history shows that Congress saw asylees

and refugees as having similar status under the law, indicating that those granted asylum were to be "placed into *a conditional admission status equivalent in most respects to that provided under current law to refugees.*" *Id.* (emphasis added).

Nothing in the legislative history indicates that asylum status was so distinct that it conferred an exemption from statutes governing the conduct of other aliens admitted to the United States, or otherwise provided additional relief from removal that was unavailable to refugees. *See Kaganovich*, 470 F.3d at 898 (agreeing with BIA's determination that INA's refugee provisions could not be read to immunize refugees from the INA's removal provision). Consistent with this [**24] history, we decline to read section 209(b) as providing asylees who have acquired LPR status with additional avenues for avoiding removal that are otherwise foreclosed to similarly situated refugees.

In sum, at the time of his request for "re-adjustment" of status, Robleto retained [*1062] his LPR status. *See* 8 C.F.R. § 1001.1 (p). Section 209(b), by its plain language, contemplates an asylee's adjustment of status to LPR, and does not extend relief to aliens who have already acquired LPR status. This natural reading of section 209(b) is consistent with decisions of the Seventh and Fourth Circuits in the analogous context of refugees who have previously adjusted status, and with our prior decision in *Kaganovich*. Because petitioner advances no other theory of relief from removal, we deny his petition and hold that an alien who acquired lawful permanent resident status based on

a prior grant of asylum may not "reapply" for LPR status under section 209 in order to avoid removal.

D. Due Process Claim

Finally, petitioner asserts that the IJ denied him due process by denying his request for a continuance to obtain his immigration records.

"[A]n alien who faces deportation is entitled to a full and fair [**25] hearing of his claims and a reasonable opportunity to present evidence on his behalf." *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *see also Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002). In order to show a due process violation, an applicant must show prejudice. *Cano-Merida*, 311 F.3d at 965. Prejudice is shown where the violation potentially affected the outcome of the proceedings. *Id.*

Petitioner fails to establish prejudice. Although the IJ conducted the removal proceedings in the absence of petitioner's full immigration file, petitioner was able to present his claims for relief without it. Moreover, the BIA had the full record before it when examining petitioner's appeal. As set forth above, nothing in petitioner's file changes the fact that he is currently ineligible for asylum. Moreover, even after examining petitioner's full immigration file, the BIA determined that petitioner failed to establish that his prior grant of asylum was based on actual, past persecution or that he was likely to suffer persecution upon return to Nicaragua. We find that the record supports this view. Accordingly, petitioner has failed to show that

a continuance would have affected the outcome [**26] of the proceedings.

III.

Based on the foregoing, we conclude that the IJA did not err in denying petitioner's applications for asylum and withholding of removal under the INA and the CAT. Further, we conclude that petitioner retained his status as a lawful permanent resident during the removal proceedings, and therefore was not eligible to seek relief from removal under section 209(b) of the INA in connection with a waiver of inadmissibility under section 209(c). Finally, we conclude that the denial of petitioner's request for a continuance does not amount to a due process violation. Accordingly, the petitions for review are **DENIED**.

JORGE FILADELFO ROBLETO-PASTORA,
Petitioner,

v.

ERIC H. HOLDER JR., Attorney General, Respondent.

No. 07-71492, No. 07-72091

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

567 F.3d 437 (9th Cir. 2009)

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted December 10, 2008 -- Seattle, Washington

May 27, 2009, Filed

Before: Robert R. Beezer, Ronald M. Gould and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Callahan

SUBSEQUENT HISTORY: Amended by, Rehearing denied by, Rehearing, en banc, denied by

Robleto-Pastora v. Holder, 591 F.3d 1051, (9th Cir., 2010)

Amended by, Petition denied by *Robleto-Pastora v. Holder*, 591 F.3d 1051, (9th Cir., 2010)

COUNSEL: Philip James Smith, Nelson Smith, LLP, Portland, Oregon, for the petitioner.

Gregory G. Katsas, Richard M. Evans, and Paul Fiorino, United States Department of Justice, Washington, D.C., for the respondent.

OPINION

[*440] CALLAHAN, Circuit Judge:

Jorge Filadelfo Robleto-Pastora ("Robleto" or "petitioner"), born June 5, 1960, is a native and citizen of Nicaragua who entered the United States in 1984, was granted asylum, then adjusted status to that of lawful permanent resident (sometimes referred to herein as "LPR") in 1988. Following his 2005 forgery conviction in Oregon state court, petitioner was ordered removed as an aggravated felon pursuant to sections 237(a)(2)(A)(iii) and 101(a)(43)(R) of the Immigration and Nationality Act ("INA"). 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1101(a)(43)(R). He petitions for review of the removal order, and the denial of his motion to reconsider that order. We deny both petitions.

I.

A. Factual Background

Robleto and several of [**2] his family members left Nicaragua in the mid-1980s when the Sandinistas rose to power. In 1986, he and other family members were granted asylum pursuant to section 208 of the INA. *See* 8 U.S.C. § 1158. On October 2, 1988, he adjusted his status to lawful permanent resident pursuant to section 209(b). 8 U.S.C. § 1159(b).

In October 2004, Robleto was arrested and charged in Oregon state court with forgery-related offenses involving the distribution of false identifications. On July 29, 2005, he pled no contest to six counts of first-degree forgery, and was sentenced to thirteen months in prison. He was released from prison after eleven months, and then charged with removability under section 237(a)(2)(A)(iii) of the INA. *See* 8 U.S.C. § 1227(a)(2)(A)(iii).

During the removal proceedings, Robleto sought relief from removal by (1) submitting a new application for asylum, (2) applying for withholding of removal under section 241(b)(3) of the INA and the Convention Against Torture ("CAT"), and (3) seeking to adjust his status under section 209(b) of the INA in connection with a waiver of inadmissibility under section 209(c). 8 U.S.C. § 1159(b)-(c).

On August 23, 2006, an Immigration Judge ("IJ") [**3] ruled that Robleto was ineligible to apply for adjustment of status under section 209(b)

because that section was available only to asylees, and not lawful permanent residents such as Robleto.

Following several continuances, Robleto appeared before an IJ on December 5, 2006. He testified that his father and brother were employees in the Somoza government, and that he worked as a mechanic in the government's "General Customs" division. All three of them lost their jobs when the Sandinistas took control of the government. Robleto testified that he was unable to find gainful employment after he was fired, but admitted that he did not look for work in the private sector.

Other than losing his job, Robleto did not allege that he suffered actual persecution by the Sandinistas. Robleto's mother testified generally that the Sandinistas harassed the entire family due to their association with the Somoza government, but she failed to identify any specific persecution suffered by Robleto. Robleto's brother, Sergio, however, was detained by the Sandinistas for several hours in 1981 based on suspicions that he was involved with a school bombing. Another brother, Alvaro, was also detained by the Sandinistas [**4] in [*441] 1982, and was beaten and tortured. Robleto further testified that he is related to Eden Pastora, a famous anti Sandinista leader.

Noting the 2006 reelection of Sandinista leader, Daniel Ortega, Robleto testified that he feared returning to Nicaragua. He alleged that the government would think he was an American spy, but cited no basis for this fear. He also failed to

produce evidence that the current democratically-elected administration was persecuting former Somoza-government employees or members of Robleto's family. In fact, he testified that several aunts and uncles from both sides of his family, and at least one grandparent, still live in Nicaragua, and his mother testified that she and her husband had gone back to visit since leaving in the 1980s.

Citing, among other things, Robleto's aggravated felony, the IJ denied Robleto's application for asylum.[1] The IJ also denied his application for withholding based on his failure to establish past persecution or a well founded fear of persecution, and ordered him removed to Nicaragua.

B. BIA Decision

On March 27, 2007, the BIA dismissed Robleto's appeal from the IJ's decision finding him removable as charged and denying his applications for relief. The BIA held that the IJ properly pretermitted Robleto's new asylum application based on his aggravated felony conviction, and concluded that Robleto failed to establish that he was entitled to withholding of removal. The BIA rejected Robleto's contentions that he retained the

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[1] The IJ concluded that Robleto had obtained asylum derivatively through his father. While it is unclear from the record whether his grant of asylum was [**5] primary or derivative, it was nonetheless his burden to establish past persecution or a well-founded fear of future persecution. *See Ilnuakhaulu v. Gonzales*, 416 F.3d 931, 937-39 (9th Cir. 2005).

status of an asylee, and that such status entitled him to a presumption of a well-founded fear of persecution. Noting that his original asylum application contained no allegation of past persecution, the BIA held that a prior grant of asylum was insufficient to establish the presumption. The BIA noted that Robleto presented no evidence that he would be of any interest to the current administration, or that it otherwise persecuted former Somoza-government employees or relatives of former government employees. Accordingly, the BIA concluded that Robleto failed [**6] to establish a likelihood of future persecution in Nicaragua.

The BIA also concluded that Robleto's status was that of a lawful permanent resident, not an asylee, and that he retained that status until a final order of removal. Thus, it concluded that Robleto's request to apply for adjustment of status under section 209(b) in connection with a waiver of inadmissibility under section 209(c) "made no sense." Finally, the BIA concluded that Robleto's due process rights were not violated when the IJ denied his request for a continuance to obtain his immigration records because he failed to establish prejudice resulting from the denial.

On April 20, 2007, Robleto filed a motion for reconsideration with respect to the BIA's determination that he was ineligible to apply for adjustment of status under section 209(b). On May 3, 2007, the BIA denied Robleto's motion to reconsider. Robleto filed timely petitions for review

of that order and the March 27, 2007, order dismissing his appeal.[2]

[*442] II.

A. Jurisdiction [**7] and Standards of Review

We have jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review final orders of removal involving "constitutional claims or questions of law," such as the ones presented in Robleto's petitions. *See Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1053 (9th Cir. 2006). Where the BIA conducts its own review of the evidence and law, "our review is limited to the BIA's decision, except to the extent the IJ's opinion is expressly adopted." *Hosseini v. Gonzales*, 471 F.3d 953, 957 (9th Cir. 2006) (citation and internal quotation marks omitted).

We review the BIA's determination of purely legal questions de novo. *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004). We may reverse the BIA's determination that an applicant is ineligible for asylum or withholding of removal "only if the evidence presented by [the applicant] is such that a reasonable fact-finder would be compelled to conclude that the requisite fear of persecution existed." *Khourassany v. INS*, 208 F.3d 1096, 1100

[2] Petitioner presents no independent grounds challenging the order denying his motion to reconsider. Accordingly, we deny his petition for review of that order for the reasons set forth herein.

(9th Cir. 2000); *see also INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992) (noting that "[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* [**8] it") (emphasis in original).

B. Application for Asylum and Withholding of Removal

We begin with the most straightforward of petitioner's claims for relief: his applications for asylum and withholding of removal under the INA and the CAT. "An application for asylum under 8 U.S.C. § 1158 is generally considered an application for withholding of removal under 8 U.S.C. § 1231(b)(3)." *Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006) (citing 8 C.F.R. § 1208.3(b)). For asylum applications filed after April 1, 1997, an applicant is also considered for eligibility for withholding of removal under the CAT. *See* 8 C.F.R. § 208.13(c)(1).

"An alien is eligible for asylum relief if she can prove that she is a refugee, which she can establish by proving either actual past persecution or a well-founded fear of future persecution" on account of race, religion, nationality, membership in a particular social group, or political opinion. *Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007); 8 U.S.C. § 1101(a)(42)(A). The agent(s) of persecution must be "the government or . . . persons or organizations which the government is unable or unwilling to control." *Reyes-Reyes v. Ashcroft*, 384

F.3d 782, 788 (9th Cir. 2004) [**9] (internal quotation marks omitted). "Once an applicant demonstrates past persecution, there is a presumption of a well-founded fear of future persecution." *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000).

Robleto argues that he is eligible for asylum and withholding based on his previous grant of asylum, which he asserts entitles him to a presumption of a well-founded fear of future persecution. However, even assuming that Robleto's previous grant of asylum was based on actual past persecution, the BIA correctly determined that he is currently ineligible for asylum due to his aggravated felony conviction.[3] *Rendon v. Mukasey*, 520 F.3d 967, 973 (9th Cir. 2008) (recognizing that an alien convicted of an aggravated felony is [*443] ineligible for asylum) (citing U.S.C. §§ 1158(b)(2)(A)(ii), (b)(2)(B)(I)); *see also* 8 C.F.R. § 1208.13(c)(1) (providing that for applications filed after April 1, 1997, an applicant "*shall not qualify* for asylum" if he has been convicted of an aggravated felony) (emphasis added).

While Robleto's conviction precludes his current asylum application, it does not preclude his application for withholding [**10] of removal under section 241(b)(3) of the INA. 8 U.S.C. § 1231(b)(3).[4]

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[3] Robleto does not contest that his conviction is an aggravated felony.

[4] Robleto's aggravated felony does not bar him from applying for withholding of removal under 8 U.S.C. § 1231(b)(3). Subsection (b)(3)(B)(ii) provides that an alien

""To qualify for withholding of removal, an alien must demonstrate that it is more likely than not that he would be subject to persecution on one of the specified grounds.'" *Zehatye*, 453 F.3d at 1190 (quoting *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001)). The "standard for withholding of removal is more stringent than the well-founded fear standard governing asylum," and "requires objective evidence that it is more likely than not that the alien will be subject to persecution upon deportation." *Id.* (citations and quotation marks omitted). While a showing of past persecution entitles an alien to a presumption of eligibility for withholding of removal, it is the alien's burden to establish such persecution. *Fedunyak v. Gonzales*, 477 F.3d 1126, 1130 (9th Cir. 2007); *Unuakhaulu*, 416 F.3d at 938-39.

The BIA determined that Robleto's prior grant of asylum was insufficient to establish a presumption of a well-founded fear of future persecution based on past persecution. We agree.

Here, neither the record nor Robleto's own testimony establishes past persecution. While Robleto's original asylum application identifies incidents from the early 1980s involving his

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convicted of a "particularly serious crime" is ineligible for withholding of removal. The statute authorizes the Attorney General to designate a crime "particularly [**11] serious" and provides that any aggravated felony resulting in a sentence of five years or more "shall be considered . . . a particularly serious crime." 8 U.S.C. § 1231(b)(3)(B). Here, Robleto's conviction did not result in a sentence of five or more years, and the Attorney General has not otherwise determined that his crime is "particularly serious."

brothers, Sergio and Alvaro, it contains no allegation that Robleto himself was persecuted. *See Prasad v. INS*, 47 F.3d 336, 340 (9th Cir. 1995) (concluding that "attacks on family members do not necessarily establish a well-founded fear of persecution absent a pattern of persecution tied to the petitioner[]"). Moreover, Robleto acknowledged during the immigration proceedings that, other than losing his job, he was not personally targeted by the Sandinistas. Even in his 2006 application [**12] for asylum and withholding of removal, Robleto identified no instances of persecution involving himself. Based on Robleto's failure to establish that his prior grant of asylum was based on past persecution, we conclude that the BIA correctly determined that he was not entitled to a presumption of a well founded fear of persecution.

Furthermore, we find that the record supports the BIA's determination that Robleto failed to show a likelihood of future persecution in Nicaragua. Robleto presented no evidence indicating that the current administration persecutes former employees of the Somoza government or family members of those who opposed the Sandinistas more than twenty years ago. Moreover, Robleto failed to present a plausible basis for his alleged fear of returning to Nicaragua. Rather, he testified that he thought that the current Nicaraguan administration would think he was an American spy because he had unsuccessfully [*444] tried to enlist in the United States Army in the early 1990s. He did not indicate how the administration would know this fact, or why it would lead the government to believe he was a spy, or even that the government

actually persecutes American "spies." Finally, he [**13] offered no evidence that any family member or former government employee is persecuted by the current Nicaraguan administration, and indicated that several of his aunts and uncles from both sides of his family, and at least one grandparent, still live in Nicaragua.

Based on this record, we are not compelled to reach a conclusion contrary to the BIA's. *See Khourassany*, 208 F.3d at 1100. Neither can we conclude that petitioner is entitled to relief under the CAT, as there was no evidence regarding a likelihood that Robleto would be tortured upon his return. *See Hamoui v. Ashcroft*, 389 F.3d 821, 826-27 (9th Cir. 2004) (noting that to be eligible for withholding under the CAT, the applicant must establish that he is "more likely than not" to be tortured upon removal). Based on the foregoing, we conclude that the BIA's determination is supported by the record, and that Robleto is not entitled to withholding from removal under the INA or the CAT.

C. Asylum Status and Adjustment under Section 209(b) and (c)

We turn now to petitioner's other claims, which are interconnected and somewhat circular in nature. Robleto's thesis is that even though his status was adjusted to lawful permanent resident [**14] in 1988, he simultaneously retains his status as an asylee. He argues that under the relevant statutory and regulatory scheme, asylum status

remains intact unless it is formally terminated. Further, Robleto argues that by virtue of his continued status as an asylee, he is eligible to "readjust" his status to lawful permanent resident under section 209(b) in connection with a waiver of inadmissibility under 209(c), and thereby avoid removal. We reject his arguments.

1. *Termination of Asylum Status*

Robleto alleges that the BIA erred by ordering him removed without first formally terminating his asylum status. He asserts that he retained his asylum status despite his acquisition of LPR status because adjustment of status is not an articulated basis for terminating asylum. *See* 8 U.S.C. § 1158(c)(2).[5] Petitioner is correct that

[5] Subsection (c)(2) specifically provides that an alien's asylum status may be terminated if:

(A) the alien no longer meets the conditions described in subsection (b)(1) [pertaining to eligibility for asylum] owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2) [setting forth grounds that make an alien ineligible for asylum];

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

acquisition of LPR status is not an enumerated basis for terminating asylum status. However, that does not answer the question of whether respondent could order him removed without first formally terminating his asylum status. Because we conclude that Robleto was a lawful permanent resident and not an asylee [*445] at the time of his removal, we conclude that the INA's [**15] asylum termination provisions did not apply to him, and accordingly, that no formal termination was required.

Section 208(c)(1) of the INA provides, in relevant part, that, "[i]n the case of an alien granted asylum under subsection (b) of this section, the Attorney General -- (A) *shall not remove or return the alien to the alien's country* of nationality." 8 U.S.C. § 1158(c)(1)(A) (emphasis added).

This prohibition against removal of an asylee is qualified by section 208(c)(2), which provides that "[a]sylum granted under subsection (b) . . . does not convey a right to remain permanently in the United States. . . ." 8 U.S.C. § 1158(c)(2). Subsection (c)(2) further provides that asylum "may be terminated if the Attorney General determines that," among other things, the alien no longer meets the conditions of subsection (b)(1) [i.e., no longer meets the definition of a refugee],[6] has voluntarily availed himself of the

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(B) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality . . . ; or

(C) the alien has acquired a new nationality and enjoys the protection of the country of [**16] his or her new nationality.

8 U.S.C. § 1158(c)(2).

[6] Subsection (b)(1)(A) provides, in relevant part:

protection of his native country, has acquired a new nationality, or meets a condition set forth in subsection (b)(2), which sets forth bars to asylum eligibility. *See* 8 U.S.C. § 1158(b)(2), (c)(2).

Section 208(c)(3) of the INA, entitled "Removal when asylum is terminated," provides that an alien "described in paragraph [(c)](2) is subject to any applicable grounds of inadmissibility or deportability under section [*sic*] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title." 8 U.S.C. § 1158(c)(3) (footnote omitted).

Despite its title, subsection (c)(3) does not explicitly require that an asylee's status be terminated prior to removal. Rather, it simply provides that an alien "described in paragraph (2)" -- that is, an alien who is *eligible* for termination -- is subject to removal on the same grounds as any other alien. The attendant regulations provide more detail regarding the context and bases for terminating asylum status prior to removal. *See, e.g.*, 8 C.F.R. §§ 208.22, 208.24, 1208.22, 1208.24 (allowing asylum officers to terminate [**18] asylum status if they determine, after an interview, that qualifying

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The Secretary of Homeland Security or the Attorney General may grant asylum to an alien [**17] who has applied for asylum . . . if the Secretary of Homeland Security or the Attorney General determines that such alien *is a refugee within the meaning of section 1101(a)(42)(A) of this title*

8 U.S.C. § 1158(b)(1)(A) (emphasis added).

grounds exist).[7] While these regulations seem to require formal termination according to specifically enumerated grounds, they appear only to address termination of asylum for asylees [*446] who have not yet adjusted status to that of lawful permanent resident. Thus, we need not consider whether, even for such individuals, these regulations are exhaustive.[8]

[7] 8 C.F.R. § 1208.22 provides, in relevant part, that "[a]n alien who has been granted asylum may not be deported or removed unless his or her asylum status is terminated pursuant to § 1208.24." Section 1208.24(a) provides, in relevant part:

> [A]n asylum officer may terminate a grant of asylum made under the jurisdiction of an asylum officer or a district director if following an interview, the asylum officer determines that:
>
> (1) There is a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted,
>
> (2) As to applications filed on or after April 1, 1997, one or more of the conditions described in section 208(c)(2) of the Act exist, or
>
> (3) As to applications filed before April 1, 1997, the alien no longer has a well founded [**19] fear of persecution upon return . . . or the alien has committed any act that would have been grounds for denial of asylum under § 1208.13(c)(2).

[8] Although we conclude that these regulations do not apply to petitioner, his reliance on them presents other problems, namely, their apparent conflict with the INA's general removal provision. While the plain language of 8 C.F.R. § 1208.22 constrains termination of asylum status to the grounds enumerated in 8 C.F.R. § 1208.24, those grounds do not encompass all the grounds for removability set forth in section 237(a), the INA's general removal provision. *See* 8 U.S.C. § 1227(a). For example, although an alien is removable

Petitioner suggests that because the statute and attendant regulations do not list acquisition of LPR status as a basis for termination of asylum, he must, therefore, retain that status simultaneously with his LPR status. However, petitioner's reliance on the silence of the statute and regulations cannot overcome the logic of the statutory scheme, which treats asylees and lawful permanent residents differently, or the BIA's interpretation of the statute as applying only to asylees who have not yet adjusted status.

Each status has legally distinctive features. *Compare, e.g.*, 8 U.S.C. § 1101(a)(20) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States.") *with* 8 U.S.C. § 1158(c)(2) ("Asylum . . . does not convey a right to remain permanently in the United States . . . .") Moreover, asylum status may be terminated simply by virtue of the fact that an alien no longer qualifies as a refugee. *See* 8

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under section 237(a) for committing two crimes of moral turpitude, illegal voting, or spousal abuse, these are not grounds for termination under 8 C.F.R. § 1208.24. Thus, an asylee convicted of two crimes of moral turpitude, for example, would not be removable under section 1208.22. This anomalous result is inconsistent with the principle articulated in section 208(c)(2) of the INA, namely, that a grant of asylum does not convey a right to remain permanently in the country, as well as with the INA's general removal provision, [**20] which states that "*[a]ny alien*" may be removed. *See Kaganovich v. Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006) (quoting 8 U.S.C. § 1227(a)) (emphasis in original).

U.S.C. § 1158(c)(2)(A); [**21] 8 C.F.R. § 1208.24(a)(3) (providing that for asylum applications filed before April 1, 1997, an asylee's status may be terminated if the alien "no longer has a well-founded fear of persecution"). Not so with lawful permanent resident status, a fact which presents a significant incentive for an alien to adjust his status to that of lawful permanent resident.[9] Here, petitioner availed himself of that incentive and acquired LPR status. He retained that status until a final order of removal was entered. *See* 8 C.F.R. § 1001.1(p).[10]

Based on the foregoing, we conclude that petitioner, having chosen to become a lawful permanent resident with its attendant benefits, was no longer an asylee at the time of his removal proceedings, and was therefore not covered by the statutory and regulatory provisions concerning formal termination of asylum status.

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[9] We note that the REAL ID Act of 2005 amended section 209(b) so that the Secretary of Homeland Security is no longer limited by the number of adjustments to LPR status she may grant to asylees each fiscal year. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 101(g)(1)(B)(D), 119 Stat. 231, 305 (2005) (amending 8 U.S.C. § 1159(b) (1990)).

[10] 8 C.F.R. § 1001.1(p) provides:

> The term lawfully admitted for permanent residence means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion, deportation, removal, or rescission.

[*447] 2. *"Re adjustment" and Waiver under Section 209*

Having determined that petitioner's status during the removal proceedings was that of a lawful permanent resident and not an asylee, we next consider his contention that he is entitled to seek relief from removal by "re adjusting" his status to lawful permanent resident. We conclude that he is not.

Petitioner seeks to avoid removal by applying to "re-adjust" status under section 209(b).[11] That section, however, requires that the asylee be admissible. 8 U.S.C. § 1159(b)(5). Petitioner concedes inadmissibility based on his aggravated felony conviction, and seeks to overcome this barrier to adjustment by seeking a waiver of inadmissibility pursuant to section 209(c). That section provides the

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[11] Section 209(b) provides in relevant part:

> The Secretary of Homeland Security or the Attorney General . . . may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who -
>
> (1) applies for such adjustment,
>
> (2) has been physically present in the United States for at least one year after being granted asylum,
>
> (3) continues to be a refugee within the meaning of section 1101(a)(42)(A) of this title or a spouse or child of such a refugee,
>
> (4) is not firmly resettled in any foreign country, and
>
> (5) is admissible . . .

8 U.S.C. § 1159(b).

Secretary or the Attorney General with discretion to waive inadmissibility "for [**23] humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1159(c).

The BIA rejected petitioner's claim for relief under section 209, reasoning that it made "no sense" in light of 8 C.F.R. § 1001.1(p), which provides that LPR status remains intact until issuance of a final order of removal. The BIA determined that petitioner retained his LPR status, not asylee status, and as such, could not avail himself of section 209(b) and (c).

Not surprisingly, we can find no case squarely addressing the issue of whether an alien who has adjusted status from asylee [**24] to LPR may seek relief from removal under section 209. The statute provides for an asylee's adjustment of status to lawful permanent resident, a process petitioner completed in 1988. Accordingly, section 209(b) would appear to be inapplicable. Further, the waiver of inadmissibility in section 209(c) appears to be designed for consideration of inadmissibility when the issue is first considered, i.e., soon after the alien's entry into the United States. Thus, we agree with the BIA that the petitioner's invocation of section 209 "makes no sense" because it does not apply to lawful permanent residents seeking relief from removal.

We find support for our perspective in cases from our sister circuits, which have held that *refugees* who adjust status to lawful permanent resident are ineligible for relief from removal under section 209(a) in connection with a waiver of

inadmissibility under section 209(c). *Gutnik v. Gonzales*, 469 F.3d 683, 692 (7th Cir. 2006) (holding that an alien who adjusted status from refugee to LPR was no longer eligible to apply for a waiver of inadmissibility in connection with an adjustment of status under section 209); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 569 n.16 (7th Cir. 2008) [**25] ("We have held that, when an individual adjusts his status to that of lawful permanent resident, he still may meet the *definition* of a refugee under 8 U.S.C. § 1101(a)(42); however, he no longer retains [*448] his refugee *status* under 8 U.S.C. § 1157."); *Saintha v. Mukasey*, 516 F.3d 243, 252-53 (4th Cir. 2008) (applying Chevron deference to the BIA's determination that a refugee who had already acquired LPR status was precluded from subsequently re-adjusting to LPR status).

While these cases involve section 209(a), which concerns adjustment of status from *refugee* to LPR, they are nonetheless instructive. In *Gutnik*, the Seventh Circuit deferred to the BIA's determination that relief under section 209 was unavailable to a removable refugee who had previously adjusted his status to that of LPR. *Gutnik*, 469 F.3d at 692. The BIA adopted the IJ's reasoning that Gutnik was ineligible to apply for the waiver of inadmissibility under 8 U.S.C. § 1159(c) because his prior adjustment of status to LPR terminated his refugee status. *Id.* at 685, 689. The BIA also noted that allowing Gutnik to apply for a waiver under section 209(c) would place "him at an unfair advantage over other aliens and would improperly [**26] insulate him from his criminal misconduct which occurred many years after his

arrival as a refugee." *Id.* at 689. The BIA's reasoning appears to reflect a concern that non-refugee aliens who had previously adjusted status and were facing removal would not have similar opportunities to "readjust" under section 209.[12]

This reasoning echoes the concern we voiced in *Kaganovich* in deciding that refugee status should not be used to insulate aliens from the otherwise applicable removal statute. *See Kaganovich*, 470 F.3d at 898 (finding persuasive the BIA's holding in *In re Smriko*, 23 I. & N. Dec. 836 (BIA 2005) that 8 U.S.C. § 1157(c)(4) should not be read to shield refugees from the INA's general removal provision).

Similarly, in *Saintha*, the Fourth Circuit deferred to the BIA's interpretation of section 209(a)(1) as precluding relief from removal for a refugee who had previously acquired LPR status.[13]

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[12] Although section 245(a) of the INA allows an alien to apply for adjustment of status, that section, unlike section 209, requires the alien to have a nonimmigrant visa immediately available. *See* 8 U.S.C. § 1255(a).

[13] Section 209(a)(1) provides in relevant part:

a) Criteria and procedures applicable for admission as immigrant, effect of adjustment.

(1) Any alien who has been admitted to the United States under section 1157 of this title

(A) whose admission has not been terminated [**28] by the Secretary of Homeland Security or the Attorney General pursuant to such regulations as the Secretary of Homeland Security or the Attorney General may prescribe,

(B) who has been physically present in the United States for at least one year, and

Saintha, 516 F.3d at 247, 253. The BIA rejected Saintha's application to adjust [**27] status a second time under section 209(a) in connection with a waiver of inadmissibility under section 209(c), concluding that the plain language of section 209(a)(1) precluded "a refugee who has already acquired LPR status . . . from subsequently re-adjusting to LPR status." *Id.* at 247. Specifically, the BIA read section 209(a)(1) as providing three criteria for adjusting status, one of which requires the alien not to have already "acquired permanent resident status." *Id.* at 253. Because Saintha had already acquired LPR status, he could not satisfy this criterion, and therefore was ineligible to adjust status a second time. *Id.* The [*449] Fourth Circuit agreed with the BIA's interpretation, noting that it was "logical to conclude that an alien . . . who has previously acquired permanent resident status but was later rendered removable by the commission of multiple crimes, is ineligible to acquire LPR status again under § 1159." *Id.*

We find the Fourth and Seventh Circuits' interpretation of section 209(a) to be persuasive. It is consistent with our conclusion that petitioner was a lawful permanent resident and not an asylee

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(C) *who has not acquired permanent resident status,*

shall, at the end of such year period return or be returned to the custody of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 1225, 1229a, and 1231 of this title.

8 U.S.C. § 1159(a)(1) (emphasis added).

during the removal proceedings, and we see no reason why we should read 209(b) in a contrary manner with respect to asylees who have acquired lawful permanent resident status.[14] Although section 209(a) explicitly provides that adjustment under that section is unavailable to refugees who have already "acquired permanent resident status," *see* 8 U.S.C. § 1159(a)(1)(C), and section 209(b) [**29] contains no such provision, the language of section 209(b) is nonetheless clear.

It provides the Secretary of Homeland [**30] Security or the Attorney General with discretion to "adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum . . . ." 8 U.S.C. § 1159(b). It does not provide for "re-adjustment" of status for asylees who

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[14] Petitioner cites several BIA cases in which a lawful permanent resident was permitted to seek relief from removal by "re-adjusting" status to that of LPR pursuant to section 245(a) of the INA in connection with section 212's various waiver provisions. Those cases are inapposite as they concern distinct statutes whose requirements the aliens met. *See In re Mendez-Morales*, 21 I. & N. Dec. 296 (BIA 1996); *Matter of Gabryelsky*, 20 I. & N. Dec. 750 (BIA 1993). More precisely, section 245(a) applies to any alien "who was inspected and admitted or paroled into the United States" and who has a nonimmigrant visa immediately available. 8 U.S.C. § 1255(a). By contrast, section 209(b) is much narrower, and only provides for an *asylee's* adjustment of status to LPR. As set forth above, petitioner is no longer an asylee. Petitioner's reliance on *In re K-A-*, 23 I. & N. Dec. 661 (BIA 2004) is also inapposite. In that case, although the BIA determined that an asylee could apply for relief from removal under section 209(b) and (c), that asylee had not previously acquired LPR status.

have already acquired LPR status, and we decline to expand the statute's coverage to such individuals. To do so would provide unique relief to asylees who have acquired LPR status, while precluding such relief for similarly situated refugees, many of whom, unlike petitioner, will not have been convicted of an aggravated felony.

Significantly, the legislative history of the INA's asylum provisions supports our reluctance to treat refugees and asylees disparately, as it indicates that the two classes of aliens were to have essentially "equivalent status" under the law. The INA's asylum provisions were enacted into law pursuant to the Refugee Act of 1980. The Refugee Act, in addition to "regulariz[ing] the procedures governing the admission of refugees into the United States," *INS v. Stevic*, 467 U.S. 407, 425, 104 S. Ct. 2489, 81 L. Ed. 2d 321 (1984), required the Attorney General to establish procedures for "determining asylum claims filed by aliens who are physically [**31] present in the United States." Refugee Act of 1980, S. Rep. No 96-256, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 149. The legislative history shows that Congress saw asylees and refugees as having similar status under the law, indicating that those granted asylum were to be "placed into *a conditional admission status equivalent in most respects to that provided under current law to refugees.*" *Id.* (emphasis added).

Nothing in the legislative history indicates that asylum status was so distinct [*450] that it conferred an exemption from statutes governing the conduct of other aliens admitted to the United

States, or otherwise provided additional relief from removal that was unavailable to refugees. *See Kaganovich*, 470 F.3d at 898 (agreeing with BIA's determination that INA's refugee provisions could not be read to immunize refugees from the INA's removal provision). Consistent with this history, we decline to read section 209(b) as providing asylees who have acquired LPR status with additional avenues for avoiding removal that are otherwise foreclosed to similarly situated refugees.

As set forth above, at the time of his request for "readjustment" Robleto was, in fact, an alien lawfully [**32] admitted for permanent residence. He retained that status until a final order of removal. *See* 8 C.F.R. § 1001.1(p). Section 209(b), by its terms, contemplates an asylee's adjustment of status to LPR, and does not extend relief to aliens who have already acquired LPR status. This plain reading of section 209(b) is consistent with decisions of the Seventh and Fourth Circuits holding that relief from removal under 209(a) is unavailable to refugees who have adjusted status. Based on the foregoing, we deny Robleto's petition and hold that an alien who acquired lawful permanent resident status based on a prior grant of asylum may not "re-apply" for LPR status and relief from removal under section 209(b).

D. Due Process Claim

Finally, petitioner asserts that the IJ denied him due process by denying his request for a continuance to obtain his immigration records.

"[A]n alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *see also Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002). In order to show a due process violation, an applicant must show prejudice. [***33] *Cano-Merida*, 311 F.3d at 965. Prejudice is shown where the violation potentially affected the outcome of the proceedings. *Id.*

Petitioner fails to establish prejudice. Although the IJ conducted the removal proceedings in the absence of petitioner's full immigration file, petitioner was able to present his claims for relief without it. Moreover, the BIA had the full record before it when examining petitioner's appeal. As set forth above, nothing in petitioner's file changes the fact that he is currently ineligible for asylum. Moreover, even after examining petitioner's full immigration file, the BIA determined that petitioner failed to establish that his prior grant of asylum was based on actual, past persecution or that he was likely to suffer persecution upon return to Nicaragua. We find that the record supports this view. Accordingly, petitioner has failed to show that a continuance would have affected the outcome of the proceedings.

III

Based on the foregoing, we conclude that the BIA did not err in denying petitioner's applications for asylum and withholding of removal under the

INA and the CAT. Further, we conclude that petitioner retained his status as a lawful permanent resident [*434] during the removal proceedings, and therefore was not covered by section 208(c)'s termination provisions and its attendant regulations. We also conclude that, as an alien with lawful permanent resident status, petitioner was not eligible to seek relief from removal under section 209(b) of the INA in connection with a waiver of inadmissibility under section 209(c). Finally, we conclude that the denial [*451] of petitioner's request for a continuance does not amount to a due process violation. Accordingly, the petitions for review are **DENIED.**

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A27 447 476 - Tacoma Date: May 03, 2007

In re: JORGE FILADELFO ROBLETO-PASTORA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Philip Smith, Esquire

ON BEHALF OF DHS:
Marci L. Ellsworth, Assistant Chief Counsel

ORDER:

PER CURIAM. This case was last before the Board on March 27, 2007, when we dismissed the respondent's appeal from the Immigration Judge's denial of his applications for relief from removal, and concluded that the respondent had failed to establish a due process violation. On April

20, 2007, the respondent made a timely motion to reconsider, asserting that the Board erred in failing to allow him to adjust his status under section 209(b) and (c) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1159(b) and (c). He asserts that his status as an asylee was never terminated, and that he remains eligible for that relief despite the fact that he previously adjusted his status to that of a lawful permanent resident on October 2, 1988. The Department of Homeland Security (DHS), has objected to the motion. The motion will be denied.

Motions to reconsider challenge the Board's original decision, generally asserting that it is defective in some way. *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). *See Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991). It is a "request that the Board reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked." *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002) *quoting Matter of Cerna*, supra, at 402 n. 2 (BIA 1991). A motion to reconsider must state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. Section 240(c)(6)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229(c)(6)(C); 8 C.F.R. § 1003.2(b)(l).

In this case, the respondent essentially repeats the same arguments he made in support of his appeal, asserting that he retains asylee status and should be permitted to adjust his status. His citation *Matter of Gabryelsky*,, 20 I&N Dec. 750 (BIA 1993), however, does not support this claim.

We find that the respondent has not persuasively demonstrated any error in our decision, which was based on an analysis of all the evidence of record. Accordingly, the motion to reconsider is denied.

s/ _____
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A27 447 476 -Tacoma

Date: March 27, 2007

In re: JORGE FILADELFO ROBLETO-PASTORA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Philip Smith, Esquire

ON BEHALF OF DHS:
Marci L. Ellsworth, Assistant Chief Counsel

ORDER:

[**1] PER CURIAM. The respondent has appealed from the Immigration Judge's December 5, 2006, decision finding him removable as charged, and denying his applications for relief from removal. The Immigration Judge concluded that the respondent had been convicted of an aggravated

felony, and thus was ineligible to apply for asylum. *See* section 101(a)(43)(R) of the Immigration and Nationality Act (Act), 8 U.S.C. 1101(a)(43)(R) (an offense relating to forgery for which the term of imprisonment is at least one year); sections 208(b)(A)(ii) and (B)(i) of the Act, 8 U.S.C. § 1231(b)(3), and for deferral of removal under the Convention Against Torture (CAT), but concluded that he had failed to meet his burden of proving eligibility for those forms of relief. The appeal will be dismissed.

The respondent is a native of Nicaragua who entered this country on January 7,1984. He was granted political asylum on December 5,1986, and on October 2,1988, he adjusted his status to that of a lawful permanent resident pursuant to section 209(b) of the Act, 8 U.S.C. § 1159(b). On July 29, 2005, he was convicted in the Washington County Circuit Court for the State of Oregon for 6 counts of Forgery in the First Degree, in violation of ORS 165.013, for which the term of imprisonment was 13 months. He subsequently was put into removal proceedings.

On appeal, the respondent asserts that his prior grant of asylum was never terminated and that he continues to qualify as an asylee; thus, he should have been entitled to a presumption of past persecution based on that prior grant of asylum. He also claims that the Immigration Judge's failure to grant a continuance to allow him to obtain evidence of his prior asylum application was a violation of his right to due process because he was unable to use that evidence to demonstrate a prior finding of past

persecution in Nicaragua. The respondent also asserts that, because his asylee status remains valid, he should be permitted to adjust his status with a waiver under section 209(c) of the Act, 8 U.S.C. § 1159(c). Finally, he asserts that the evidence introduced to demonstrate changed country conditions in Nicaragua was insufficient "to constitute the type of individualized determination necessary to show a fundamental change in circumstances" in Nicaragua. Id. at 6 [sic].

[**2] As noted above, the respondent was lawfully admitted for permanent residence on October 2, 1988. Lawful permanent resident status does not terminate until after the issuance of a final administrative order of removal. *See* 8 C.F.R. § 1001.1(p). Accordingly, the respondent retains that status, not asylee status, at this time.[1] *See*

[1] Moreover, asylee status once granted, does not convey a right to remain permanently in the United States. *See* section 208(c)(2), 8 U.S.C. § 1158(c)(2). Although a grant of asylum is effective for an indefinite period, such status can be terminated under several circumstances, including a conviction for a particularly serious crime, and specifically, an aggravated felony. *See* sections 208(c)(2)(B), 208(b)(2)(A)(ii), and 208(b)(2)(B)(i) of the Act, 8 U.S.C. §§ 1158(c)(2)(B), 1158(b)(2)(A)(ii), and 1158(b)(2)(B)(i). *See also* 8 C.F.R. § 1208.14(c) (asylum grant effective for indefinites period). Accordingly, even if the respondent had never adjusted his status to that of a lawful permanent resident, his status as an asylee would likely have been terminated prior to his opportunity to apply for adjustment of status, or denied in the exercise of discretion. *See Matter of K-A-*, 23 I&N Dec. 661, 666 (BIA 2004) (noting that "even nonviolent aggravated

generally Matter of Smriko, 23 I&N Dec. 836 (BIA 2005) ("Termination of refugee status is not a precondition to the initiation of removal proceedings against refugees who have adjusted their status). The respondent's claim that he should be permitted to apply for adjustment of status and a waiver under section 209(b) and (c) of the Act, 8 U.S.C. § 1159(b) and (c), makes no sense. The respondent cannot adjust his status to that of a lawful permanent resident, because he remains a lawful permanent resident until the issuance of a final order of removal, and because he has not established that he currently is entitled to asylum.

In addition, the Immigration Judge correctly required the respondent to file a new asylum application despite his past asylee status because the respondent has never established that the prior grant of asylum was based on a finding of past persecution. *See* 8 C.F.R. [sic] 1208.13(b)(1) (stating that, an alien who is determined to have suffered past persecution is presumed to have a well-founded fear of future persecution in the absence of evidence to the contrary, including a fundamental change in circumstances or the alien's ability to relocate safely to another part of the proposed country of removal). *See also* 8 C.F.R. § 1208.16) (withholding of removal). The mere fact that the respondent was previously granted asylum is not sufficient to create the presumption." Moreover, the Immigration

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felonies will generally constitute significant negative factors militating strongly against a favorable exercise of discretion").

[2] The respondent has submitted a copy of his original

Judge specifically concluded that even if the respondent had originally been granted asylum based on past persecution, the regulatory presumption had been rebutted by a review of current country conditions in Nicaragua (I.J. at 12).

Turning to the respondent's current applications for asylum, the immigration Judge correctly pretermitted the respondent's application for asylum based on his conviction for an aggravated felony. In regard to the respondent's application for withholding of removal under section 241(b)(3) of the Act, the United States Court of Appeals for the Ninth Circuit, in which this case arises, has held that persecution, "is the infliction of suffering or harm upon those who differ in race, religion [**3] or political opinion in a way regarded as offensive." *See Korablina v. INS*, 158 F.3d 1038, 1043. "It is an extreme concept that does not include every sort of treatment society regards as offensive." *Id.* at 1044. In this case, the respondent acknowledged that nothing specifically happened to him in Nicaragua in the past, other than being fired from his job. The Immigration Judge correctly concluded that, although his father and brothers were harmed in the past, the respondent did not establish past persecution on account of what happened to his brother or father in Nicaragua (I.J. at 10-11). Accordingly, no presumption of future persecution attaches to his claim.

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asylum application with his brief on appeal. However, the application contains no claim that the respondent suffered past persecution.

The respondent also asserts that it is more likely then not that he will be persecuted upon his return to Nicaragua because of his father's prior political activities, and because his family was threatened with harm in the past because of their political activities. As correctly noted by the Immigration Judge, the respondent has the burden of proving that it is more likely than not that he will be persecuted on account of a protected ground if returned to Nicaragua, that he could not avoid persecution by relocating within Nicaragua, and that such relocation would not be unreasonable. *See* 8 C.F.R. § 1208.16(b)(2) and (3). In this case, the respondent has submitted evidence that his brother was detained many years ago, prior to the respondent's departure from Nicaragua. He also has submitted evidence regarding general country conditions in Nicaragua. He has not, however, demonstrated that former government employees are persecuted upon their return to Nicaragua, that relatives of former government employees are persecuted in Nicaragua, or that he would be of interest to the current administration in Nicaragua simply because of his status as a government employee under a former regime. Contrary to the respondent's claim on appeal, he has the burden of proving eligibility for withholding of removal. The minimal evidence presented by the respondent in support of his claim that he will be persecuted upon his return to Nicaragua, which the Immigration Judge described as speculative, is insufficient to meet that burden (I.J. at 11). *See* 8 C.F.R. § 1208.16(b) (the burden of proof is on the applicant

for withholding of removal to establish that it is more likely than not that he will be persecuted).

In addition, the Immigration Judge correctly found that the respondent failed to meet his burden of proving that it is more likely than not that he will be tortured upon his return to Nicaragua. *See* 8 C.F.R. § 1208.16(c)(2) and (4). *See generally Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006) (eligibility for deferral of removal cannot be established by stringing together a series of suppositions to show that it is more likely than not that torture will result where evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen). The respondent's uninformed speculation about what would happen to him in Nicaragua is insufficient to meet that burden. *Matter of J-F-F-*, *supra*, at 919.

Turning to the respondent's claim that his due Process rights were violated when the Immigration Judge failed to grant a continuance without allowing him to obtain his immigration records, we find no error in the Immigration Judge's decision. An Immigration Judge may grant a motion for a continuance "for good cause shown." *See* 8 C.F.R. § 1003.29. A decision to deny a continuance will not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearing. *Matter of Perez-Andrade*, 19 I&N Dec. 433, 434 (BIA 1987); *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973). An alien must demonstrate that the denial of a continuance [**4] caused him actual prejudice and harm, and materially affected the outcome of the case. *Matter of Sibrun*, 18 I&N

Dec. 354, 355-56 (BIA 1983). In this case, the respondent was granted continuances on June 26, 2006, July 3, 2006, July 19, 2006, and August 22, 2006. The respondent has not demonstrated that he was prejudiced by the Immigration Judge's denial of an indefinite continuance to await a FOIA request, because he appears statutorily ineligible for any form of relief from removal.

Accordingly, the appeal is dismissed.

/s/ _____

FOR THE BOARD

UNITED STATES DEPARTMENT OF
JUSTICE EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

UNITED STATES IMMIGRATION COURT

Tacoma, Washington

File No.: A 27 447 476 December 5, 2006

In the matter of

JORGE FILADELFO
ROBLETO PASTORA,
Respondent

IN REMOVAL
PROCEEDINGS

CHARGE:

APPLICATIONS:

ON BEHALF OF
RESPONDENT:

Philip Smith, Esquire
Hecht & Smith, LLP
208 S.W. 1st Avenue,
Suite 360 Portland, OR
97204

ON BEHALF OF DHS:

Marcy Ellsworth
Esquire Assistant
Chief Counsel
Detention Facility in
Tacoma, WA

ORAL DECISION OF THE IMMIGRATION JUDGE

[**1] Respondent is a 46-year-old single male, native and citizen of Nicaragua. He first entered the United States at or near San Ysidro, California on or about January 7, 1984. At that time he was not inspected or paroled after admission into the United States.

The respondent was adjusted to permanent resident status on October 2, 1988 under Section 209(b) of the Act. This means that respondent was granted asylum or was granted derivative asylum based upon as asylum application filed and approved on behalf of [**2] either his father or his mother. According to the testimony, it appears that the application for asylum encompassed the whole family other than the oldest of his siblings and that the mother, father and at least five other siblings, including the respondent, were granted at the same time. There is no definitive evidence as to how respondent received asylum but the Court has relied upon the I-551, which has been marked into the record as part of Exhibit 2. This is the alien registration card which shows that the code used is LOS, standing for Los Angeles, AS, standing for asylum, Six, which I don't know what it is, and then number three. The Court's understanding is that this was asylum granted to the respondent as a derivative, however, as already indicated that is not absolutely definitive since the government does not

have its original file but that is at the FOIA Unit or the Federal Records Center.

In Exhibit 3 of this record there is a copy of the creation of record which also is not particularly helpful because it only indicates that respondent entered as a B-2, which I also do not think is correct, and the year of his admission was 1984 and he was adjusted under Section 209(b) of the Immigration and Nationality Act. It does not indicate on this form I-181 whether he was a primary applicant for asylum or whether he was a derivative.

Since the burden is on the respondent to prove the manner in which he was granted asylum and that the Court only has the Form [**3] I-551 to use as its basis for determining whether he was the principal or relative, the Court is relying upon what is written upon the Form I-551 and its understanding that he was granted derivatively. Therefore, this means that he himself did not qualify for asylum but by virtue of a parent being granted that relief he was eligible as a derivative, therefore, I do not believe that the rebuttable position takes place that he has already established a well-founded fear or past persecution.

The respondent was placed in removal proceedings pursuant to a Notice to Appear dated August 17, 2005, Exhibit 1, in which he was charged with being removable pursuant to Section 327(a)(2)(A)(iii) of the Act. Although the respondent admitted all six factual allegations including the conviction, he contested the charge of removability, however, the Court based upon the conviction

document would find that it establishes that respondent was sentenced to a term of imprisonment of 13 months and, therefore, it constitutes a conviction for a crime involving forgery which resulted in a term of imprisonment of at least one year, therefore, it is an aggravated felony.

Because the respondent declined to designate a country to which he should be removed the Court pursuant to Section 241(b)(1)(C) of the Immigration and Nationality Act (hereinafter referred to as the Act) designated Nicaragua should such action become necessary.

As already indicated the respondent submitted a new [**4] application for political asylum which is contained in the record at Exhibit 2. This application for asylum is also considered a request for restriction on removal to a country where the alien's life or freedom would be threatened pursuant to Section 241(b)(3) of the Act.

For asylum applications filed on or after April 1, 1997, an applicant shall also be considered for eligibility for withholding of removal under the United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading treatment or Punishment (Torture Convention) if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal. See 8 C.F.R. Section 208.13(c)(1).

In the normal course of business when an applicant files an affirmative or defensive application with the Asylum Office in the former instance and in the Court on the latter, a copy is

forwarded to the Department of State for an advisory opinion. There is no indication any opinion was issued in this case by the Bureau of Democracy, Human Rights and Labor. Instead the Government has submitted the usual background documentation in the form of the Country Reports on Human Rights Practices contained in the record at Exhibit 7 and 8 and also the respondent has submitted documents in support of the pre-hearing statement regarding country conditions at Exhibit 9, 10 and 11. Exhibit 10 does refer to the kidnapping of the respondent's [**5] brother, Sergio, by the Sandinista group, however, that occurred long before the respondent came to the United States and just corroborates information that was given in respondent's testimony as well as in the respondent's witness, his mother's, testimony.

For purposes of identity the Court has used the creation of record as well as the Form I-551. So it has no issue with regard to respondent's identity.

To be eligible for asylum, respondent must establish a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. However, he also must be eligible based upon having filed his application within one year of his entry into the United States, which is moot since he had previously been granted asylum upon his entry and once it became clear he was in removal proceedings he has not timely filed. More importantly, however, the respondent is not eligible for asylum in the Court's opinion because he has

suffered a conviction for an aggravated felony and, therefore, he is barred from asylum.

Nevertheless he continues to be eligible to pursue relief under section 241(b)(3) but to do so he must establish there is a real likelihood or clear probability that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion. See INS v. Stevic, 467 U.S. 406 (1984).

The respondent has given general evidence of oppressive [**6] conditions in his home country and this includes current evidence to show that the most recent election returned the former Sandinista leader, Daniel Ortega, to power as the president of Nicaragua. This occurred within the last month or so. This may support specific information relating to an individual's well-founded fear of persecution. Zavala-Bonile v. INS, 730 F.2d 562 (9th Cir. 1984).

An alien must point to specific objective facts that support an inference of past persecution or a risk of future persecution. The objective facts can be established through credible evidence and persuasive testimony by the alien. Once such credible evidence has been presented, the alien's subjective fear and desire to avoid a risk-related situation become relevant. Cardoza-Fonseca v. INS, supra, 480 U.S. 421 (1987). An alien's testimony is extremely important because individuals applying for asylum are often limited in the evidence which they can obtain to show proof of persecution. Plateros-Cortez v. INS, 804 F.2d 1127 (9th Cir. 1986).

The respondent testified before this court about his family situation in Nicaragua before they fled there in the late 1970's or early 1980's and which resulted in the family being granted asylum in 1988.

Additionally the respondent's mother, Gladys Robleto Pastora, also testified on behalf of the respondent. She too left Nicaragua at the same time as her son, the respondent, and [**7] received asylum through the same application.

The respondent now finds himself in removal proceedings because of a criminal conviction for which he plead guilty and that involved other members of his family. Although he seems to be a very minor player in this incident, the respondent is the only one who is in removal proceedings to the best of the court's knowledge. The other brother, who was also indicted at the same time, went to trial and all of the charged were either not sustained or were dismissed. So respondent is left with a very difficult situation.

The respondent was approximately 24 years of age when he left Nicaragua to come to the United States with his mother. Before that he had been working for the Somoza government as part of the mechanical shop for the General Customs Organization in Managua. Not only had the respondent worked for the Somoza government but also his father had been a 30-year employee and his brother had also served the government. Upon the overthrow of Somoza and the rise to power of the Sandinistas, the respondent, his father and his brother were all fired from their positions.

According to the respondent, he did not have any gainful employment between being fired in 1979 or 1980 until he came to the United States in 1984.

The respondent described incidents that had occurred against two members of his immediate family, specifically his brother, Sergio, and also his brother, Alvaro.

[**8] Sergio was in school at the time that the war was raging between the Somozas and the Sandinistas. Apparently a bomb went off in the lavatory of the school and Sergio was accused of being responsible for this. The account given by the respondent is somewhat different than the account given by his mother as to what actually happened, However, the bottom line was that Sergio was not charged with any crime and he was not hurt in any way although there was harassment by members of the Sandinista youth against him until such time as he left the country for the United States. Nevertheless he was never taken into custody. He was never charged with a crime and he was never physically mistreated as far as the testimony given today is concerned.

The second brother of the respondent, Alvaro, had come to the United States sometime possibly in the late 1970's and was returned from the United States to Nicaragua in the early 1980's. Again this is not really clear either through the testimony of the respondent or through the witness since neither could remember the exact time when this happened. The claim that Alvaro was physically mistreated by the Sandinistas is contingent upon his return to Nicaragua after being sent back from the United

States. Apparently he was mistreated upon his arrival and there is an allegation that he had some drug shot into his head which has caused him to never be right after that. He currently immigrated to the United States and lives here with his mother and not had gainful employment as far as the Court knows.

[**9] The respondent himself never had any direct or indirect contact with the Sandinistas other than being removed from his job when they took over the government and literally wiped it clean of any former Sandinista supporters. This is the story that this Court has heard on many occasions since it has had the experience of a number of Nicaraguan asylum cases being presented before it in the early 1990's.

The respondent is fearful of what might happened to him if he is required to return to Nicaragua because he believes that he will be persecuted and harassed by the Sandinistas who now have come back into power. He said that he does not want to return there because he fears that what happened to Alvaro could happen to him and if not, that he would have no means of making a life for himself there because he would be known through his family affiliation as having been a supporter of former President Somoza.

The only members of the family who have returned to Nicaragua since arriving here and being granted the asylum include the respondent's mother, who was a witness today. She does not recall exactly when she went back but thinks it may have been 20 years ago and during that time it was

for the purpose of burying her father. She was there only a short time and had no problems while there.

The other family member who returned is the respondent's father, who is estranged from the respondent's mother, and there [**10] is little or no information about what happened to him when he returned due to the death of his brother. However, one of respondent's sisters accompanied him and there is no indication that there was any difficulty from the authorities while they were there in Nicaragua although it may have been a short trip.

The fact that Daniel Ortega has recently been elected president seems to be one of the more probative aspects to this case because of the fact that respondent and his family had been known to be Somozas and obviously in opposition to the Sandinista government, however, they continued to reside in Nicaragua until at least 1984 without any apparent difficulties other than those already mentioned and those were to Sergio and Alvaro. Neither of them can be found to constitute past persecution, at least in the Court's mind, because it is unknown exactly what happened or who may have been responsible for the mental condition of Alvaro. There is no medical record. There has been no diagnosis. There has been no information that would substantiate that it was at the hands of the Sandinistas that he suffered this mental difficulty.

The respondent himself has not suffered past persecution prior to leaving Nicaragua and he bears a heavy burden to establish that it is more likely than not that he would have a fear of future

persecution if he is required to return to Nicaragua at this time.

The fact that he was a member of a family known to be Somoza [**11] family is of interest but certainly is not persuasive to this Court that this would cause him to more likely than not be subjected to persecution in the future. He has not lived in Nicaragua now for more than 22 years. He was a young man at that time. He had no particular affiliation himself. There is nothing to indicate that he has done anything in the United States that would be in furtherance of actions against the Sandinistas or that anyone would have any particular interest in the respondent nor if he was required to return to his home country at this point in time. Therefore, it is speculative at best that he would be singled out for persecution in the future which is necessary in order to establish that it is more likely than not or that there is a clear probability that his life or freedom would be threatened on account of any one of the protected five grounds. For that reason the Court would deny him withholding of removal pursuant to Section 241(b)(3).

With regard to eligibility under the Torture Convention, the same burden of proof is required and that is that it is more likely than not that respondent has a present fear of torture. That torture must be by or instigated by or with the consent or acquiescence of a public official or person acting in an official capacity. The evidence in the record does not establish that it is more likely than not that there is a present fear of torture for

whatever reason not limited to the protected five grounds. The respondent has nothing to offer that the Court can see as far [**12] as his return to Nicaragua. He has not been active in any way. He is a humble man with minimal education and has not particularly accomplished anything here in the United States which would be of interest to any organization, the Sandinistas or otherwise if required to return to his home country.

The respondent previously was granted asylum. As the Court has made clear, it believes that he was granted as a beneficiary and, therefore, he himself did not establish the fact that he had either suffered persecution in the past or that there was a well-founded fear of persecution. Nevertheless if this record on review is not upheld, the Court would note in passing that there has been such a significant change in Nicaragua since the time that respondent left there in 1984 despite the recent election of Daniel Ortega that the Court would find that there is no real objective basis for a fear of future persecution at this point in time. There is nothing to indicate that this election was controlled by the Sandinistas and I am certain that our Government is not particularly happy with the outcome but it does not indicate that it was an unfair or an illegal election at least so far. On that basis the popular vote in Nicaragua selected Daniel Ortega because other individuals have been found to be corrupt and it was an open and free election.

The Court believes that this record does not establish that respondent either has an objective basis for a fear that it is more likely than not that

he will be subject to persecution in [**13] the future and he has failed in his burden of proof that he is eligible for protection under the Torture Convention in that it is not more likely than not that there is a present fear of torture. On that basis the Court will deny him both grounds of relief.

The respondent is not eligible for the relief of voluntary departure, therefore, he will be ordered removed from the United States to Nicaragua. Accordingly the order is as follows.

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum is denied on the basis that he cannot establish eligibility due to having been convicted of an aggravated felony.

IS FURTHER ORDERED that the respondent's application for withholding of removal is also denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under Article 3 of the Convention against Torture is also denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Nicaragua on the charge contained in the Notice to Appear.

BETTE KANE STOCKTON
Immigration Judge

UNITED STATES DEPARTMENT OFJUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW IMMIGRATIONCOURT
Seattle, Washington

File No.: A 27 447 476 Aug. 23,2006

In the Matter of: IN REMOVAL PROCEEDINGS

Jorge Robleto,

Respondent Before Immigration Judge Kenneth Josephson

CHARGE:
Aggravated Felon.

APPLICATION: Request for section 209(c) Waiver.

ON BEHALF OF RESPONDENT:
Philip Smith, Esq.

ON BEHALF OF DHS: James Yi, Esq

ORDER OF THE IMMIGRATION JUDGE

As discussed at Master Calendar of Aug. 22, I agree with the DHS position that the respondent cannot seek a section 209(c) waiver. I understand that he was previously granted asylum but he adjusted status to an LPR. He was not admitted under section 207 of the INA. I agree that by its

terms section 209 only applies to refugees and asylees and that an individual who became an LPR is not in that category. *See* generally *Matter of Smriko, 23 I & N Dec. 836 (BIA 2005)* (An alien admitted as a refugee who subsequently adjusted status to an LPR is not entitled to have his refugee status terminated before being placed in removal proceedings rejecting.) This case remains set on the Individual Calendar for hearing on the current requests for asylum, withholding of removal, and protection under CAT.

s/Kenneth Josephson

JORGE FILADELFO ROBLETO-PASTORA,
Petitioner,
v.
ERIC H. HOLDER JR.,
Attorney General,
Respondent.

No. 07-71492, No. 07-72091

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

591 F.3d 1051; 2010 U.S. App. LEXIS 738

January 11, 2010, Decided

PRIOR HISTORY: [**1]

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A027-447-476. Agency No. A027-447-476.

Robleto Pastora v. Holder, 567 F.3d 437, 2009 U.S. App. LEXIS 11121 (9th Cir., 2009)

JUDGES: Before: Robert R. Beezer, Ronald M. Gould and Consuelo M. Callahan, Circuit Judges.

OPINION

[*1054] ORDER

The opinion filed May 27, 2009, and published at 567 F.3d 437, is hereby amended. The amended opinion is filed con-currently with this order. With the amendments, the panel votes to deny the petition for rehearing. Judge Gould and Judge Callahan vote to deny the petition for rehearing en banc, and Judge Beezer so recommends.

The full court was advised of the suggestion for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and petition for rehearing en banc are hereby DENIED. The panel will entertain any additional petitions for rehearing or rehearing en banc that are filed in accordance with the applicable rules.

SO ORDERED.

UNHCR
United Nations High Commissioner for Refugees
Regional Representation in Washington

1775 K Street NW
Suite 300
Washington, DC 20006

24 February 2010

Tel. (202) 243.7621
Fax: (202) 296.5660
Email: goldberg@unhcr.org

Re: Advisory Opinion on Refugee/ Asylee Protection Robleto-Pastora v. Holder

Philip James Smith
NELSON I SMITH, LLP
208 SW First Avenue, Suite 360
Portland, Oregon 97204

Dear Mr. Smith:

I am writing in response to your request for an advisory opinion from the Office of the United Nations High Commissioner for Refugees ("UNHCR"). The issue you have asked us to address is whether refugee status and its correlative protections "cease" or "terminate" once a refugee or asylee becomes a lawful permanent resident (LPR) in the country of asylum. While LPR status is a positive and important step in the process of finding a durable solution for refugees and asylees, refugee status does not cease unless and until one of the cessation clauses of the 1951 Convention relating to the Status of Refugees (" 1951 Convention")[1] has been satisfied. Obtaining LPR status is not a basis for cessation of refugee status under the Convention.

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[1] 89 U.N.T.S. 137 (1951), *entered into force* 22 *Apr.* 1954. In 1968, the United States ratified the *1967 Protocol relating to the Status of Refugees*, which amended the refugee definition by removing any temporal or geographical limitations to it and incorporates by reference all the substantive provisions of the Convention, including all the articles addressed in this letter. *Protocol relating to the Status Refugees*, 606 U.N.T.S. 267 (1967), *entered into force* 4 *Oct. 1967* ("1967 Protocol").

THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

UNHCR has been charged by the United Nations General Assembly with responsibility for providing international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problem of refugees by assisting governments and private organizations.[2] As set forth in its Statute, UNHCR fulfills its international protection mandate by, inter alia, "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.[3] UNHCR's supervisory responsibility is mirrored in Article II of the 1967 Protocol relating to the Status of Refugees ("1967 Protocol"),[4] to which the United States acceded in 1968. The 1967 Protocol incorporates the substantive provisions of the 1951 Convention.

The views of UNHCR are informed by over 55 years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides international protection and direct assistance to refugees

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[2] *See* Statute of UNHCR, UN Doc. A/RES/428(V), Annex, at paras. 1, 6 (1950).

[3] *Id.* at para. 8(a).

[4] 606 U.N.T.S. 267, art. 2.

throughout the world and has staff in over 100 countries. It has received the Nobel Peace Prize twice, in 1954 and 1981, for its work on behalf of refugees. UNHCR's interpretation of the provisions of the 1951 Convention and its 1967 Protocol are both authoritative and integral to promoting consistency in the global regime for the protection of refugees.

ANALYSIS

REFUGEE STATUS PROTECTION CONTINUES UNLESS A FORMAL DETERMINATION IS MADE THAT CESSATION OF STATUS IS WARRANTED

I. Cessation Grounds under Article 1(C) of the Convention

Under international law, refugee status and the protections accorded with it can only be lost if an individual is determined to fall under one of the six cessation clauses listed in Article 1C of the 1951 Convention.[5] The UNHCR *Handbook on Procedures*

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[5] The other manner by which individuals can lose their refugee status under the Convention is through cancellation of refugee status. The *UNHCR Handbook* clarifies that cancellation of refugee status is not included in the grounds for cessation and may only arise if circumstances come to light that indicate that a person should not have been recognized as a refugee in the first place, such as, for example, where refugee status was

and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ("Handbook")[6] states: "Once a person's status as a refugee has been determined, it is maintained unless [she or] he

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obtained by a misrepresentation of material facts or that one of the exclusion clauses would have applied to an individual had all of the relevant facts been known at the time of recognition. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the* 1967 *Protocol relating to the Status of Refugees (Handbook)* (1979 reedited 1992), at para. 117. There is no question in this case that refugee status was conferred in error and, as such, cancellation of refugee status under the Convention is inapposite and will not be addressed in this letter.

[6] The *Handbook* was prepared by UNHCR in 1979 at the request of Member States of the Executive Committee of the High Commissioner's Programme, including the US, to provide guidance to governments in applying the terms of the Convention and Protocol. The US Supreme Court in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439, n.22 (1987), determined that, although not legally binding on US courts, "the *Handbook* provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *See also, INS v. Aguirre-Aguirre*, 526 US 415, 427 (1999) ("We agree the U. N. Handbook provides some guidance in construing the provisions added to the INA by the [1980] Refugee Act.") (citing *Cardoza-Fonseca)*

comes within the terms of one of the cessation clauses."[7]

As noted in the UNHCR *Guidelines on Cessation of Refugee Status:*

> [w]hen interpreting the cessation clauses, it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses. Numerous Executive Committee Conclusions affirm that the 1951 Convention and principles of refugee protection look to durable solutions for refugees. Accordingly, cessation practices should be developed in a manner consistent with the goal of durable solutions.[8]

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[7] *Handbook*, at para. 112.

[8] UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Guidelines on Cessation of Status")* UN Doc. HCR/GIP/02/03 (10 February 2003), at para. 6, *citing* Executive Committee Conclusions No. 29 (XXXIV) (1983), No. 50 (XXXIX) (1988), No. 58 (XL) (1989), No. 79 (XLVII) (1996), No. 81 (XLVIII) (1997), No. 85 (XLIX) (1998), No. 87 (L) (1999), No. 89 (L) (2000), and No. 90 (LII) (2001). The UNHCR Executive Committee is an intergovernmental group, currently comprised of seventy-two Member States of the United Nations, including the United States, and the Holy See, that advises the UNHCR in the exercise of its protection mandate. Although the Committee's Conclusions are not

The Convention delineates six cessation clauses. The first four of these "reflect a change in the situation of the refugee that has been brought about by himself,"[9] whereas the last two clauses address the situation where international protection is no longer justified due to changes in the country where persecution was feared. The cessation clauses, found under Article 1(C), provide that refugee protection under the Convention "shall cease to apply to any person" only if:

> (l) He has voluntarily re-availed himself of the protection of the country of his
> nationality; or
>
> (2) Having lost his nationality, he has voluntarily re acquired it; or
>
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

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formally binding, they are relevant to the interpretation and application of the international refugee protection regime as expressions of opinion that are broadly representative of the views of the international community. The Committee's specialized knowledge and the fact that its conclusions are reached by consensus add further weight. UNHCR Executive Committee Conclusions are available at http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=excom&id=3 bb1cd174.

[9] *Handbook*, at para. 114.

> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to a fear of persecution; or
>
> (5) He can no longer, because the circumstances in connexion *[sic]* with which
>
> he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of is nationality.
>
> (6) Beng a person who has no nationality he is, because the circumstances in
>
> connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.

The *Handbook* provides that "the cessation clauses are negative in character and exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status."[10]

2. Cessation under Article 1C(3)

In considering whether acquisition of LPR status results in cessation of refugee status, particular reference should be made to Article 1C(3) of the 1951 Convention. Article 1C(3) makes clear that

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[10] Id. at para. 116.

cessation based on protection in the country of refuge occurs only once a person has obtained a new nationality.[11] Once a refugee naturalizes, she or he should, in principle, be in a position to benefit from the protection accorded by that country to its citizens. International protection would therefore no longer be necessary and a durable solution will have been achieved.[12]

Naturalization alone, however, is not enough to trigger cessation under the Convention. Article 1C(3) requires that the person also "enjoys the protection of his new country of nationality." "This means that the refugee must secure and be able to exercise all the rights and benefits entailed by possession of the nationality of the country."[13] As

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[11] The analogous provision to Article 1C(3) under US law is found at INA Section 208(c)(2)(E) ("Asylum ... may be terminated if the Attorney General determines that - ... (E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.").

[12] *See* Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol. I (1972), at 396 ("If a refugee is naturalized in his country of refuge, he will immediately get all rights and benefits which the possession of that country entails, and it is only natural that he ceases to be a refugee.")

[13] UNHCR, *Note on the Cessation Clauses*, Executive Committee of the High Commissioner's Programme, Standing Committee, 8th meeting, UN Doc. EC/47/SC/CRP.30 (1997), at para. 15. The Note further

noted in UNHCR's *Guidelines on the Application of Cessation Clauses* at paragraph 17:

> two conditions therefore must be fulfilled in order to consider that a person who has acquired a new nationality enjoys the protection of new nationality: (l) the new nationality must be effective, in the sense that it must correspond to a genuine link between the individual and the State; and, (2) the refugee must be able and willing to avail himself or herself of the protection of the government of his or her new nationality. Only with effective national protection has a durable solution to the refugee's situation been achieved.[14]

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states that "where a refugee has acquired the nationality of the country of asylum through naturalization, refugee status will cease." *Id* This is because there is a presumption that full rights and benefits of the country of nationality will attach.

[14] UNHCR, *Guidelines on the Application of Cessation Clauses*, Inter-Office Memorandum No. 17/99, Field Office Memorandum No. 17-99 (1999), at para. 17. As noted above, in most cases where nationality is acquired in the country of asylum, these conditions are presumed to be met. This provision carries particular importance in cases where, [for example, the new nationality has been acquired through marriage. In such cases, the available protection "will depend on whether a genuine link has been established with the spouse's country." Id.

3. Acquisition of Lawful Permanent Resident Status

As noted above, the cessation clauses under the Convention are meant to be exhaustive and no other basis for withdrawing refuge status may be inferred, however analogous to an existing ground it may seem.[15] This strict approach is important because refugees should not be subjected to constant review of their refugee status. Acquisition of LPR status is not one of the enumerated grounds of cessation and should not be applied by way of analogy to Article 1C(3). It is clear from the text of the 1951 Convention and its underlying rationale that LPR status is not a sufficient basis for the cessation of refugee status and its concomitant protections.

It is notable that, in the drafting of the 1951 Convention, a proposal to cease refugee status based on lengthy residence - ten years - in the country of asylum due to either refusal to avail oneself of the possibility of naturalization or ineligibility for naturalization due to "misbehaviour," was withdrawn after other delegates expressed serious

[15] *See note 10, supra, and accompanying text, citing the Handbook,* at para. 116. *See also* Grahl-Madsen, Vol. I, at 369 ("It is generally agreed that the enumeration of cessation clauses in Article 1C of the Refugee Convention ... is exhaustive. In other words, once a person has become a refugee as defined in Article 1 of the Convention ... he continues to be a refugee until he falls under any of those cessation clauses.

reservations about it. Delegates noted that some refugees may be unable to naturalize or may be unwilling to abandon hopes of returning to their country of origin and retaining their citizenship there.[16] This further underscores the continuity of refugee status protection absent naturalization or the applicability of any other cessation clause.

LPR status is neither to be equated with nationality nor does it confer the degree of national protection that is necessary to ensure that international protection is effective and no longer necessary. While the benefits of lawful permanent residence in the US are many, LPR status is not equivalent to US citizenship in important respects. Most notably, LPR status does not ensure protection from deportation, expulsion or extradition. For purposes of cessation of refugee status under Article 1(C), this distinction is critical because returning a refugee to the country of origin runs the risk of violating the fundamental obligation of *non-refoulement* under Article 33 of the Convention.

REFUGEE STATUS MAY CO-EXIST WITH OTHER FORMS OF IMMIGRATION STATUS

1. General

As noted earlier, and as made clear from the cessation clauses of the 1951 Convention, the

[16] *See* UN Doc. A/Conf.2/SR23 (1951), at 21-25.

ultimate goal for refugees is to find a durable solution to their situation. For purposes of cessation, the durable solution of national protection in the country of refuge occurs at the point of naturalization. It is understood, however, that a process of assimilation and integration will occur before a refugee is naturalized. This process envisions a strengthening of the links between the refugee and the country of refuge, most notably through the acquisition of more permanent forms of legal status, such as lawful permanent residence.

As the connection between refugee and country of refuge strengthens, however, the individual's underlying status as a refugee remains constant, given that the particular needs of the refugee, be they protection-related, such as protection from deportation, or otherwise, such as assuring family reunification,[17] will continue. The maintenance of refugee status better ensures that refugees will not refrain from integrating more fully in their host society for fear of losing the benefits that accompany refugee status.

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[17] *See Handbook*, Chptr VI, Principle of Family Unity, paras. 181-188. *And see, The Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 189 U.N.T.S. 37, Art. IV 3. ("considering that the unity of the family, the natural and fundamental group of society, is an essential right of the refugee... . [Governments should ensure] that the unity of the refugee's family is maintained... .")

Maintaining refugee status also ensures that should the additional legal status granted them ever be rescinded, the refugee status will continue to provide protection. In this manner, refugee status and other forms of legal status in the country of refuge are coextensive, not mutually exclusive. The additional legal status is, in effect, layered over the underlying refugee status that the individual continues to enjoy.

2. Articles 2-34 of the 1951 Convention

The structure of the 1951 Convention reflects this "layering" of rights. Articles 2-34 detail the various rights and obligations of refugees under the 1951 Convention. These include the right to non-discrimination, religion, personal status, association, access to courts, among others. These rights, however, are not equally available to all refugees. Rather, many depend on the status and the degree of integration of the individual in the country of refuge.[18] For example, about half of the substantive provisions of the 1951 Convention refer to "refugees" without any distinction or

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[18] For a general discussion of this continuum of rights based on degree of connection between refugee and country of refuge, *see* Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3d ed. 2007), at 524-528. *See also* James Hathaway and Anne Cusik, "Refugee Rights Are Not Negotiable," 14 *Geo. Immigr. L.J.*, 481, 491-98 (2000).

qualification.[19] Other provisions, however, categorize the refugees to whom they apply, including refugees "in the territory" of the Contracting State[20], who have entered or are present "without authorization"[21], who are "lawfully" in the territory of a Contracting State[22], who are "lawfully staying" in the territory of a Contracting State[23], who are "lawfully resident" in the Contracting State,[24] who are "habitually

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[19] *See, e.g.*, Articles 2 (general obligations), 3 (non-discrimination), 5 (rights granted apart from this Convention), 7 (exemption from reciprocity), 9 (provisional measures), 10 (continuity of residence), 13 (movable and immovable property), 16(1) (access to courts), 20 (rationing), 22 (public education), 28(2) (travel documents), 29 (fiscal charges), 30 (transfer of assets), 33 (prohibition of expulsion or return),
and 34 (naturalization).

[20] *See, e.g.*, Article 4 (religion), 27 (identity papers) and

[21] Article 31 (refugees unlawfully in the country of refuge).

[22] *See, e.g.*, Articles 18 (self-employment), 26 (freedom of movement), 28(1) (travel documents) and 32 (expulsion).

[23] *See, e.g.*, Articles 15 (right of association), 17 (wage-earning employment), 19 (liberal professions), 21 (housing), 23 (public relief), 24 (labor legislation and social security) and 28(1) (travel documents).

[24] *See, e.g.*, Paragraphs 6(1) and (3) and 11 of the Schedules to the 1951 Convention.

resident",[25] and who can claim a "right of establishment."[26]

Those provisions of the 1951 Convention which detail the rights of refugees "lawfully" in the country of refuge, "lawfully staying" in the country of refuge, "lawfully residing" in the country of refuge, and so forth, envision that the refugee may have a legal status in the country of refuge in addition to, and distinct from, his or her refugee status. For some of these provisions, mere admission as an asylum-seeker or admission on a temporary visitor's visa may be sufficient to invoke the corresponding rights of the 1951 Convention.[27]

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[25] *See, e.g.*, Articles 14 (artistic rights and industrial property), 16(2) and (3) (access to courts).

[26] As noted by Grahl-Madsen, "[t]he term 'right of establishment' is not used in any of the provisions of the Refugee Convention ... , but the concept is found in the *travaux preparatoires* for the Refugee Convention, and it has got some expression in paragraph 6(1) and 11 of the two Schedules .... "). Grahl-Madsen, Vol. II, at 334.

[27] *See, e.g.*, Grahl-Madsen, Vol. II, at 357 (refugees are 'lawfully' in territory if they possess proper travel documents, have observed frontier control formalities, and have not overstayed period and conditions of authorized stay, and are 'lawfully staying' in territory if they have been lawfully present for three months or are in possession of a residence permit authorizing stay for more than three months); Hathaway and Cusick, at 495 ("Where the laws of a state authorize the direct arrival of refugees who submit to a status determination or

Those refugees who enjoy some form of permanent or indefinite residence in the Contracting State, however, would be eligible for most, if not all, of the rights under the 1951 Convention, including those which require the greatest degree of connection between refugee and country of refuge, such as "habitual residence" or "right of establishment."[28] This would equally apply to refugees who obtain lawful permanent residence in the United States.

Consistent with the language and purpose of the substantive provisions of the 1951 Convention, therefore, refugees who acquire lawful permanent residence do not lose their refugee status but rather benefit from an expanded range of rights under the Convention. In this regard, refugee status and LPR status co-exist. They are not mutually exclusive. Moreover, denying a refugee protection based on the acquisition of obtaining lawful permanent resident status and returning a refugee to the country of origin runs the risk of violating the fundamental

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comparable procedure, it cannot sensibly be argued that refugees who avail themselves of this legal option are not lawfully present.")

[28] "[The 'right of establishment'] denotes a right to remain indefinitely in a territory (subject only to the provisions of Article 1C, 32 and 33 of the Refugee Convention). Such a right might be granted explicitly - by issuing an establishment permit or a residence permit valid for an indefinite period, etc. – or implicitly." Grahl-Madsen, Vol. II, at 358.

obligation of *non-refoulement* under Article of the Convention.

CONCLUSION

As the above analysis demonstrates, it is UNHCR's view that an individual's refugee status and the protections it provides continue after the acquisition of lawful permanent residence.

We hope this is useful to you and the U.S. courts considering your case. Please do not hesitate to contact us if we can be of any further assistance.

Cordially yours,

s/ Pamela Goldberg
Pamela Goldberg
Protection Officer

8 USCS § 1101(a)(42). Refugee Definition

The term "refugee" means

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

(B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act [8 USCS § 1157(e)]) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to

undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1158(b). Asylum Eligibility

(b) Conditions for granting asylum.

(1) In general.

(A) Eligibility. The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) [8 USCS § 1101(A)(42)(A)].

(B) Burden of proof.

(i) In general. The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A) [8 USCS § 1101(a)(42)(A)]. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion,

nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden. The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood

goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions.

(A) In general. Paragraph (1) shall not apply to an alien if the Attorney General determines that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 212(a)(3)(B)(i) [8 USCS § 1182(a)(3)(B)(i)] or section 237(a)(4)(B) [8 USCS § 1227(a)(4)(B)] (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 212(a)(3)(B)(i) [8 USCS § 1182(a)(3)(B)(i)], the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules.

(i) Conviction of aggravated felony. For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses. The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations. The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review. There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children.

(A) In general. A spouse or child (as defined in section 101(b)(1) (A), (B), (C), (D), or (E) [8 USCS § 1101(b)(1)(A), (B), (C), (D), or (E)]) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children. An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue

to be classified as a child for purposes of this paragraph and section 209(b)(3) [8 USCS § 1159(b)(3)], if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction. An asylum officer (as defined in section 235(b)(1)(E) [8 USCS § 1225(b)(1)(E)]) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. 279(g))), regardless of whether filed in accordance with this section or section 235(b) [8 USCS § 1225(b)].

8 U.S.C. § 1158(c). Asylum Status

(1) In general. In the case of an alien granted asylum under subsection (b), the Attorney General--

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum. Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that--

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated. An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section [sections] 212(a) and 237(a) [8 USCS §§ 1182(a), 1227(a)], and the alien's removal or return shall be directed by the Attorney General in

accordance with sections 240 and 241 [8 USCS §§ 1229a, 1231].

8 U.S.C. § 1159(a) Refugee Adjustment

(a) Inspection and examination by Department of Homeland Security.

(1) Any alien who has been admitted to the United States under section 207 [8 USCS § 1157]--

(A) whose admission has not been terminated by the Secretary of Homeland Security or the Attorney General pursuant to such regulations as the Secretary of Homeland Security or the Attorney General may prescribe,

(B) who has been physically present in the United States for at least one year, and

(C) who has not acquired permanent resident status,

shall, at the end of such year period, return or be returned to the custody of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 235, 240, and 241 [8 USCS §§ 1225, 1229a, and 1251].

(2) Any alien who is found upon inspection and examination by an immigration officer pursuant to paragraph (1) or after a hearing before an immigration judge to be admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of the alien's inspection and examination shall, notwithstanding

any numerical limitation specified in this Act, be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien's arrival into the United States.

8 U.S.C. § 1159(b) Asylum Adjustment

(b) Requirements for adjustment. The Secretary of Homeland Security or the Attorney General, in the Secretary's or the Attorney General's discretion and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who--

(1) applies for such adjustment,

(2) has been physically present in the United States for at least one year after being granted asylum,

(3) continues to be a refugee within the meaning of section 101(a)(42)(A) [8 USCS § 1101(a)(42)(A)] or a spouse or child of such a refugee,

(4) is not firmly resettled in any foreign country, and

(5) is admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of examination for adjustment of such alien.

Upon approval of an application under this subsection, the Secretary of Homeland Security or

the Attorney General shall establish a record of the alien's admission for lawful permanent residence as of the date one year before the date of the approval of the application.

8 U.S.C. § 1159(c) Waiver

(c) Coordination with 8 USCS § 1182. The provisions of paragraphs (4), (5), and (7)(A) of section 212(a) [8 USCS § 1182(a)] shall not be applicable to any alien seeking adjustment of status under this section, and the Secretary of Homeland Security or the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (F) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

8 C.F.R. § 1208.22 Termination Required.

An alien who has been granted asylum may not be deported or removed unless his or her asylum status is terminated pursuant to § 1208.24. An alien in exclusion, deportation, or removal proceedings who is granted withholding of removal or deportation, or deferral of removal, may not be deported or removed to the country to which his or her deportation or

removal is ordered withheld or deferred unless the withholding order is terminated pursuant to § 1208.24 or deferral is terminated pursuant to § 1208.17(d) or (e).

8 C.F.R. § 1208.24(f) Termination Proceedings

(f) Termination of asylum, or withholding of deportation or removal, by an immigration judge or the Board of Immigration Appeals. An immigration judge or the Board of Immigration Appeals may reopen a case pursuant to § 1003.2 or § 1003.23 of this chapter for the purpose of terminating a grant of asylum, or a withholding of deportation or removal. In such a reopened proceeding, the Service must establish, by a preponderance of evidence, one or more of the grounds set forth in paragraphs (a) or (b) of this section. In addition, an immigration judge may terminate a grant of asylum, or a withholding of deportation or removal, made under the jurisdiction of the Service at any time after the alien has been provided a notice of intent to terminate by the Service. Any termination under this paragraph may occur in conjunction with an exclusion, deportation, or removal proceeding.

1951 Convention Relating to the Status of Refugees, 19 U.S.T 6259, 189 U.N.T.S. 150

ARTICLE 32 **Expulsion**

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

ARTICLE 33 **Prohibition of Expulsion or Return ("Refoulement")**

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom

would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.